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## Litigation as Integration and Participation: The Role of Lawsuits in the U.S. Environmental Justice Movement

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Litigation as Integration and Participation: The Role of Lawsuits in the U.S.  
Environmental Justice Movement

Senior Project Submitted to  
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by  
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Annandale-on-Hudson, New York

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## **Abstract**

*What is, has been, and could be the role of litigation in the U.S. environmental justice movement? To what ends do Indigenous communities, federally-recognized tribes, and rural Black communities choose to engage with the U.S. legal system, an institution which, over history, has consistently subjugated and dispossessed them? How do these groups' particularistic relationships to natural and built environments, conceptions of justice and fairness, and understandings of what effective environmental regulation look like inform that choice? This paper draws from in-depth qualitative research to demonstrate the following things: (1) how environmental justice lawsuits differ from canonical environmental and civil rights litigation on the basis of balancing rhetorical and social-equity based claims with strictly-legal arguments, (2) the way in which litigation serves as a key mechanism through which environmental justice constituencies can gain more accountability from government agencies and participate more fully in environmental decision making, and (3), how the processes and secondary effects of litigation can act as sites of movement building and cross-organization collaboration, as well as mechanisms through which to educate the broader public about environmental justice issues. Finally, I posit a theory of litigation which suggests that engagement with the legitimacy of the legal system, along with the compelling nature of litigation within regulatory settings, can constitute a more integrational—rather than assimilative—incorporation of environmental justice constituencies into American civil society.*



## Introduction



Figure 1. A protester is arrested by North Carolina state troopers during the North Carolina PCB Protests, 1982. (*The Washington Post*)

In 1982, over 500 peaceful demonstrators were arrested while protesting the siting of a toxic waste facility in a small, low-income predominantly Black neighborhood in Warren County, North Carolina. The facility would hold sediment contaminated with Polychlorinated biphenyls. The residents claimed that their community was being targeted on the basis of race and class.<sup>1</sup> These protests drew national attention, and led members of the U.S. House of Representatives to request

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<sup>1</sup> Polychlorinated biphenyls (PCBs) are highly toxic industrial compounds used in a wide range of electrical equipment and previously as flame retardants in manufacturing. They are "forever chemicals"; they *never* break down in the environment, and can easily accumulate in all parts of ecosystems, and bioaccumulate in humans and other animals. They have been proven to be linked to several types of cancers, and have been the cause of numerous environmental disasters in the U.S and globally. *See generally*: David Shuyler, *Embattled River: The Hudson and Modern American Environmentalism*, Cornell University Press (2018).

analysis regarding the correlation between the racial and socioeconomic demographics of certain areas and the corresponding concentrations of hazardous waste facilities and polluting enterprises.<sup>2</sup>

Many scholars and activists posited this as the seminal moment of the environmental justice movement (EJM) in the United States, the country in which this research will exclusively focus on. Environmental justice (EJ)—the ideal of achieving equal protection from environmental harms and equal access to environmental benefits— is both a social movement and a social scientific perspective. Relatedly, environmental *in*justice is at once a shared social experience and a personal narrative.

The EJM emerged from a diverse range of political projects: the Civil Rights Movement, the grassroots antitoxins movement and the environmental health movement of the 1980s, Native American organizing during the "Era of Self-Determination", feminist movements, and, less so, from the "traditinoal" environmental reform movement.<sup>3</sup> The Warren County protests were not the first time communities of color had fought back against environmental harms in their communities. In the early 1960s, Cesar Chavez led Latino farmworkers in a fight for labor rights and against exposure to harmful pesticides in the fields of the San Joaquin Valley. In 1967, Black students in Houston demonstrated against a city dump that claimed the lives of two children who drowned in liquid garbage while playing. In 1968, West Harlem residents peacefully protested the siting of a sewage treatment plant in their community. However, it was not until the Warren County protests that the term "environmental racism"—articulating the tendency for the imposition of environmental burdens

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<sup>2</sup> Julian Agyeman et al., *Trends and Directions in Environmental Justice: From Inequity to Everyday Life, Community, and Just Sustainabilities*. *Annu. Rev. Environ. Resour.* 2016. 41:321-40.

<sup>3</sup> Some literature refers to non-EJ focused environmental activism as the "mainstream" environmental movement. However, many EJ scholars have noted that the experience with environmental racism and injustice is in fact much more "mainstream" in human experience than our fleeting interactions with environmental regulatory schemes and "invisible" forces like carbon emissions or ocean acidification.

to be racialized— emerged into public, political and scholarly discourse, and the federal government took notice of the correlation between race and environmental risks and harms.<sup>4</sup>

Slowly but surely, EJ activists and community groups began to turn to the courts as a tool of resistance. In 1979, Linda Mckeever Bullard spearheaded an unprecedented class action lawsuit, *Bean v. Southwestern Waste Management Corp.* 482 F. Supp. 673 (S.D. Tex. 1979), the first ever to challenge environmental racism and discrimination using civil rights law. The case was supported by qualitative and quantitative data gathered by Bullard's students at Texas Southern University. Under the provisions of 42 U.S.C. § 1983, the plaintiffs motioned for a temporary restraining order and a preliminary injunction, contending that the decision by the Texas Department of Health (TDH) to grant a permit to the defendant to operate a Type 1 solid waste facility in the predominantly Black and Latinx East Houston-Dyer area of Harris County, was at least in part, motivated by intentional racial discrimination.<sup>5</sup>

The court found that the nature and placement of the facility would meet some of the requirements for granting a preliminary injunction: (1) the plaintiffs had demonstrated that the facility "posed a substantial threat of irreparable injury, (2) the "threatened injury to the plaintiffs may outweigh the threatened injury the injunction may do to the defendants, and (3) that the granting of an injunction would not "disserve the public interest". However, in the end, the court did not interpret the actions of TDH as being "racially motivated."

The organizing campaigns in Warren County, Houston, Harlem, and the San Joaquin Valley have a few important commonalities. First, the work of activists aimed at a primary, immediate, and tangible goal: stopping the siting of a noxious facility in their communities. Second, they involved an

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<sup>4</sup> Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, Natural Resource Defense Council Publications. (2016).

<sup>5</sup> This research resulted in the seminal work, *Houston Waste Sites and Black Communities*.

important *dispute transformation* process in which a perceived threat became linked to a responsible entity from which the community demanded greater accountability (i.e. The State of North Carolina, San Joaquin Farm owners). Third, they had important *secondary effects*: to some degree or another, these campaigns brought environmental racism and EJ into public and political discourse, creating awareness and giving legitimacy to the claims of the organizers, and in the case of *Bean*, broadcast to EJ communities that litigation was a viable tool, albeit not always a successful one.

This project examines the role of litigation and the work of legal practitioners in the contemporary EJM in the United States through the lens of these three commonalities. It seeks to answer the following interrelated questions: How do activists, plaintiffs, and legal practitioners see the role of litigation in the environmental justice/climate justice movement? What are some different ways "success" in litigation is conceptualized, beyond—or in lieu of—winning a lawsuit? And how do the varying perspectives of justice held by communities and organizations play into their decisions to litigate or not, inform litigation strategies, and their perceptions of litigation outcomes? At the broadest level, how might EJ litigation constitute a type of democratic participation? <sup>6</sup>

This project is structured as follows: I first examine relevant literature on the EJM, its advocacy tactics, and the role scholars, activists, and lawyers have conceived for litigation therein. In Part One, I draw on my interviews and content analysis to characterize an EJ lawsuit on the basis of the use of various rhetorical and communicative framing strategies. In Part Two, I show how litigation is used to gain accountability from government agencies and push back against the phenomena of "agency capture" in order to gain access to the participatory processes that guide environmental decision

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<sup>6</sup> While "environmental justice" points more toward the pursuit of equal protection from environmental harms stemming from industrial pollution and toxic waste, "climate justice" points more toward the achievement of equitable protection of marginalized and vulnerable populations from the effects of climate change, and the consideration of inequality and justice concerns in climate policy. A key question underlying this research is how EJ discursive frames and litigation can pave the way for similar legal action on climate justice.

making. In Part Three, I trace some of the ways in which the secondary effects of lawsuits inform the public, aids in cross-organization collaboration, and catalyzes the EJM as a whole. Finally, I suggest that litigation and interaction with legal processes can act as a mechanism through which EJ ideologies and constituencies can be more comprehensively incorporated—rather than assimilated—into the discourse and processes of civil society.



## Methodology

The present research is sociological, but also aims to contribute a very limited body of EJ-related law and society scholarship. I draw from literature in the disciplines of environmental sociology, political ecology, political philosophy, and the sociology of law. I also maintain a steadfast commitment to non-academic accounts of environmental (in)justice.

Three recent federal lawsuits will provide the basis for my empirical investigation: (1) *Native Village of Kivalina v. ExxonMobile Corp.*, 663 F. Supp. 2d 863 (9th Cir. 2009), (2) *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* 471 F. Supp. 3d 71, (D.C. Cir. 2021), and (3) *Friends of Buckingham v. Virginia State Air Pollution Control Board* 947 F.3d 68 (4th Cir. 2020). Several other legal cases and advocacy campaigns will also be examined here.

My empirical research combined oral interviews with content analysis. During the fall and winter of 2021-2022, I conducted in-depth, semi-structured interviews with eleven individuals recruited on the basis of their involvement with the three lawsuits I note above, their academic expertise, or their role within EJ organizations. I spoke with five lawyers, four activists/organizers, and two scholars; notably, nearly all participants self-identify in more than one of these categories.

Three of the lawyers are nationally-recognized for their counsel in high-profile EJ cases, *Kivalina* and *Standing Rock* among them; all have experience litigating and working on cases at the federal or Supreme Court levels. The activists/organizers present a range of focus areas of advocacy, such as fossil fuel and mining development, petrochemical exposure, equitable land use, housing justice, and Indigenous rights; they also present a range of roles, including plaintiff, network organizer,

communications and outreach coordinator, and executive director. The scholars I interviewed brought both theoretical insight as well as a view into how academia is grappling with and contributing to EJ advocacy.

This project also draws on my concurrent research into the housing crisis in Kingston, NY, and the ways in which EJ issues and housing inequality intersect. This research included media-based research, collaboration with grassroots community organizations, and observation of dozens of eviction proceedings in the Kingston City Court.

Content analysis for the present research took the form of identification and review of sources of law and legal authority relevant to the cases I examine and the legal analysis I conduct, including statutes, case law, administrative regulations, executive orders, and memoranda from public interest law centers. I also draw from a significant body of legal literature on EJ and environmental law more broadly. I further examined nonlegal sources such as new media, press releases, videos, and podcasts in order to gather a more comprehensive perspective of the discursive and communicative frames of plaintiffs that undergird their legal actions.

Relevant legal sources were identified and selected through my initial exposure to and research on the main focus cases. I reviewed the petitioners briefs in the cases, as well as selected amicus briefs that were published on the websites of the respective organizations, communities, and law firms. For media pieces around the focus cases, I sought out and focused on those which provided key background on the non-legal advocacy that preceded or operated in conjunction with the litigation, outlined how various rhetorical and framing strategies were operating in both contexts, and those which gave insights to the aftermath/secondary effects of the cases.



## Overview of Focus Cases

### *i. Friends of Buckingham*

In 2014, Dominion Energy proposed the 604 mile Atlantic Coast Pipeline that would run from West Virginia to North Carolina carrying compressed natural gas. A series of compressor stations were to be required along the route to ensure that the gas remains pressurized the entire way.

Dominion intended to site one of these stations in the small, rural, predominantly Black community of Union Hill, Virginia. Dominion was required to obtain a minor-source permit from the Virginia State Air Pollution Control Board (Air Board) for the proposed location of the station (see figure 2).

The Virginia Department of Environmental Quality (DEQ) recommended that the Air Board approve the permit. The Air Board voted to approve the permit on January 8, 2019, and the minor-source permit was issued.<sup>7</sup>

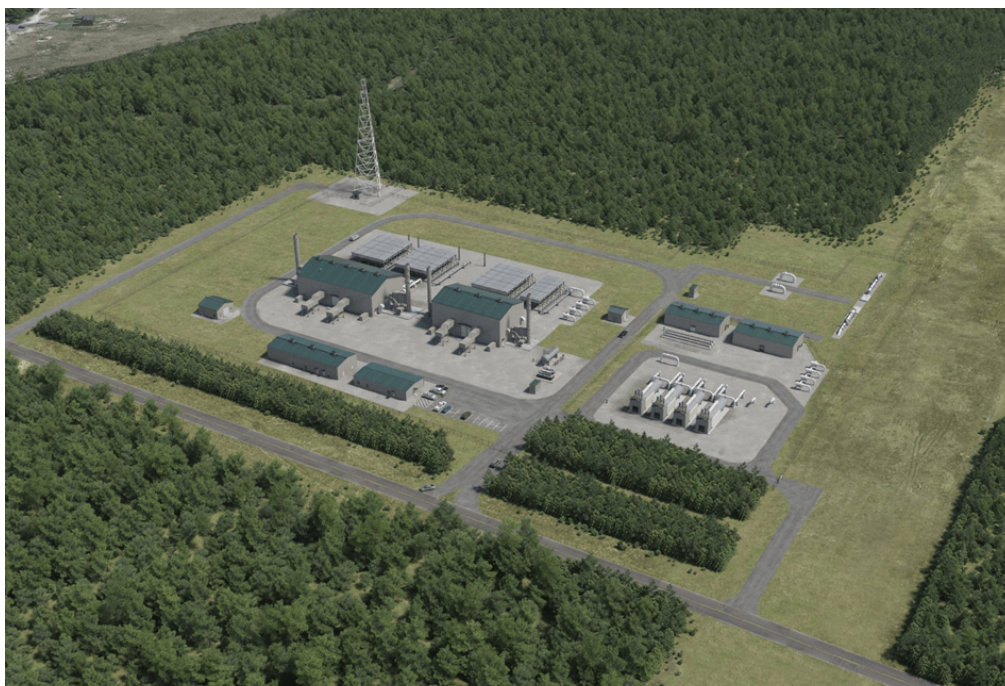


Figure 2. A computer model of the proposed compressor station in Union Hill, Buckingham County. (Virginia Mercury).

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<sup>7</sup> Compressor stations run on natural gas -fired turbines that emit large amounts of nitrogen oxide, formaldehyde, hexane, and fine particle pollution, particulate matter known to cause and exacerbate asthma and lung cancer.

On February 8, 2019, the community organization Friends of Buckingham and the Chesapeake Bay Foundation, represented by the Southern Environmental Law Center (SELC) brought a petition for the review of the Air Board's decision before the Fourth Circuit. The plaintiffs claimed that the Air Board's decision to issue the permit was arbitrary and capricious, because it had not conducted proper site suitability and EJ analysis as required under Virginia state law, conducted a comprehensive analysis of the potential for disproportionate health impacts of the station, and had also made a misinformed site suitability determination.<sup>8</sup>

The court vindicated the plaintiffs' claims, vacating the issuance of the permit and remanded the case back to the Air Board until it could provide a more comprehensive analysis of human and environmental health impacts. The court reached this conclusion on the following grounds: The Air Board (1) failed to conduct a thorough demographic assessment of the Union Hill community, (2) failed to consider the possible significant air pollution impacts of the facility regardless of formal compliance with applicable emissions standards, and (3) relied too heavily on an incomplete factual record when assessing site suitability. In the final opinion, Chief Judge Roger L. Gregory wrote that "environmental justice is not merely a box to be checked, and the Board's failure to consider the disproportionate impact on those closest to the compressor station resulted in a flawed analysis."

### *ii. Kivalina*

Kivalina is a tiny town and federally-recognized Inupiat Native Village in the Northwest Arctic Borough of Alaska, positioned on a barrier peninsula abutting the Chukchi Sea (see figure 3). Temperatures in the Arctic are increasing at nearly twice the global average. As a result, the sea ice

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<sup>8</sup> Va. Code (Ann. §10.1-1307(E)) outlines the duties and scope of authority of the Virginia State Air Pollution Control Board.

which has in the past provided vital protection to the town during harsh winter storms forms later in the season and melts earlier. Permafrost under the town is melting, resulting in erosion. Not only is erosion shrinking the size of the island dramatically, it is threatening their water sources and causing health problems.<sup>9</sup>



Figure 3. The Native Village of Kivalina, seen from above. Boulders have been shipped in and positioned to construct a sea wall to protect the village against storm surges. (*The Atlantic*)

There is a perverse irony in the fact that Kivalina, a community now confronting possible displacement by climate change, arrived on the barrier island as a result of forced displacement. At the turn of the twentieth century, shortly after Alaska was purchased by the U.S. government from the Russian Empire, Indigenous people in the area—now living under a new imperial power—were forced to

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<sup>9</sup> Moore, Rico. "The Life and Death of a Pioneering Environmental Justice Lawyer," DeSmog. Publications. (April 2021).

relocate to less desirable locations—with the threat of imprisonment—to allow for white settlement. Since as early as 1910, the Kivalina community has expressed concerns about their vulnerability to the forces of the sea, and have requested that the State of Alaska make concrete efforts to relocate them, without success.

*Kivalina* embodies an unprecedented use of public and private nuisance claims under federal common law to allege civil wrongdoing relating to the disproportionate impacts of climate change and rising sea levels. The plaintiffs, a coalition of Indigenous leaders, residents, and local officials, appealed the trial courts' dismissal of their action for damages against multiple oil, energy, and utility companies (collectively "the energy producers"). The claimants alleged that the massive quantities of greenhouse gas (GHG) emissions emitted by the energy producers had a direct causal relationship with the erosion and climate vulnerability the Village is experiencing. Not only did the plaintiffs emphasize the central role of the energy producers in facilitating anthropogenic climate change, resulting in a "substantial and unreasonable" interference with public rights, they charged that the energy producers had deliberately conspired to mislead the public and about the science and causality of climate change.

*Kivalina* demonstrates some of the numerous procedural hurdles EJ plaintiffs face in order to get their claims adjudicated in the first place. Defense lawyers argued that the village residents' allegations raised "inherently non-justiciable political questions", and thus moved to dismiss the action on lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). To this end, the defendants interpreted the political question doctrine to require the court to determine at which point GHG concentrations became excessive, *in this particular context* without guidance from the political branches and administrative agencies. They also asserted that the plaintiffs

lacked Article III standing to raise claims because they provided no "facts" showing that their injuries were "fairly traceable" to the actions of the energy producers.<sup>10</sup>

In the end, the district court concluded that the statutory provisions and regulatory implementation of the Clean Air Act (42 U.S.C §7401 et seq.) displaced the plaintiff's public nuisance tort claims. In the court's opinion, it stated that "[its] conclusion obviously does not aid *Kivalina*, which itself is being displaced by the rising sea. But the solution to *Kivalina*'s dire circumstance must rest in the hands of the legislative and executive branches of government, not the federal common law." Despite the potential for torts to provide compensation and reparations in unique and particularistic contexts, and to impose liability through deterrence, *Kivalina* demonstrates the hesitancy, on the part of federal courts, to apply common law claims of public and private nuisance to climate and emissions-related cases. While the applicability of the political question doctrine elsewhere cannot be denied, it is imperative to note that the type of compensation the plaintiffs in *Kivalina* sought cannot be provided through any sort of legislative or executive action. When combined with the high evidentiary bar required to trace the actions of the defendants to the woes of the plaintiffs, achieving redress through EJ tort claims can be understood to be quite challenging.

### *iii. Standing Rock*

The Standing Rock- Dakota Access Pipeline (DAPL) contention is a forefront and ongoing EJ dispute, both in and out of courts. Throughout the fall and winter of 2016, thousands of protesters

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<sup>10</sup> The key distinction here, as pertains to common law claims, is that the plaintiffs are pointing toward the GHGs produced during the *process* of extracting carbon fuels and creating energy and utility products. On these grounds, certain proportions of these industrial emissions (rather than those produced by the actions of private consumers) can be traced directly to the energy producers. In this sense *Kivalina* raises questions about whether private energy corporations, which are among the most profitable in the world, have an obligation, under the structure of federal common law, to ensure that the side effects of their behaviors do not infringe on the public's rights.



braved frigid temperatures and police brutality in protest of DAPL, which now runs through ecologically and culturally significant areas abutting and within the Standing Rock Sioux Reservation, running underneath the Tribe's water source and sacred fishing grounds of Oahe Lake, carrying nearly 600,000 barrels of oil a day. The Standing Rock litigation is about future risk: not only does the existence of the DAPL pipeline pose a significant ecological threat to the lake and Tribe in the form of a potential oil spill, it also undermines their sovereignty and cultural history.<sup>11</sup>



Figure 4. Lake Oahe from space (NASA Earth Observatory)

In *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, the Tribe brought an action under the National Environmental Policy Act (NEPA), alleging that the Corps violated federal law in failing to provide an adequately- comprehensive environmental impact statement (EIS) as

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<sup>11</sup> "Updates and Frequently Asked Questions: The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline." EarthJustice new publications, Accessed February 22, 2022.

required by 42 U.S.C § 4322(2)(C). Also pursuant to 40 C.F.R § 1508.9 (a), an EIS must fully examine and publicly disclose how a proposed action may significantly affect the quality of the human environment. Because the Corps failed to provide an EIS before granting an easement to Dakota Access to go forward with the project, the district court ordered that the easement be vacated and the pipeline shut down and emptied of oil. This decision was widely celebrated by tribal nations and activists across the country.

The Corps appealed the case, contending that in publishing a "Mitigated Finding of No Significant Impact", and implementation of various mitigation measures such as "horizontal drilling", the provision of an EIS was unnecessary and not lawfully required. In the end, the appellate court affirmed the district court's order to vacate the DAPL easement and direct the Corps to prepare an EIS. However, it reversed the order to the extent it no longer found shutting down and emptying the pipeline necessary. In the most recent development in the litigation, the U.S. Supreme Court in February 2022 declined a writ of certiorari by the Corps to review a decision by the lower court—a win for the Tribe—which invalidated a key federal permit for the pipeline and required a new and much more comprehensive environmental review.

## **Review of Relevant Literature**

### **I. Movement Frames and Methodologies: Crystallizing the Connection Between Social (In)equality and Environmental Quality**

#### *i. "Zip Code Inequality"*

EJ literature documents how environmental injustices generally propagate from the siting of noxious facilities and other locally unwanted land uses (LULUs). The siting of noxious facilities and

LULUs are inextricably linked to policy decisions surrounding zoning, which are deeply rooted in issues of race and ongoing urban and rural segregation. Pioneering environmental sociologist Robert Bullard (often called "the father of EJ") has posited this connection between race, space, and environmental quality as fitting within a larger trend of "zip code inequality."

Black Americans are 79% more likely than whites to live in neighborhoods where non-particulate (contamination of water, soil, etc) industrial pollution is suspected or has been identified as posing the greatest level of danger to health. 68% of Black people live within 30 miles of a coal-fired power plant, the distance determined to encompass the greatest threats to respiratory health, compared with 56% of white people. In 19 states, Black people were more than twice as likely as white individuals to live in areas where the air pollution poses the greatest health danger.<sup>12</sup>

Writ large, despite constituting a minority of the national population, people of color make up the statistical majority of individuals living in neighborhoods within two miles of the nation's most dangerous commercial hazardous waste facilities. Disproportionate environmental burdens also compound with other social stratifications: residents of communities identified by state and federal agencies to be areas of EJ concern are generally poorer, undereducated, and experience unemployment rates that are about 20% higher than the national average. Residents of these areas have less access to things like public greenspaces, fresh food, public transportation, childcare, and healthcare. These are just some of the realities that provide the impetus for the EJM, and provide the background context on which local EJ activism builds.<sup>13</sup>

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<sup>12</sup> Bullard, Robert D. et al. "Toxic Waste and Race at Twenty: Why Race Still Matters After All of These Years." *Environmental Law* 38, no. 2 (Spring 2008): 371-411.

<sup>13</sup> Bullard, "Toxic Waste," 371-411.

*ii. Environmental Justice in Native American Communities*

This project devotes considerable focus to two recent federal lawsuits in which federally-recognized tribes and villages are plaintiffs: *Native Village of Kivalina v. ExxonMobil* and *Standing Rock v. U.S. Army Corps of Engineers*. Accordingly, it is necessary to examine how the experience of indigeneity in the U.S. vis-a-vis environmental racism and injustice fits within—and in some ways diverges from—the larger dialectic of the EJM.

Renowned Cherokee legal scholar and litigator Dean B. Suagee has suggested that the EJM "needs Indians more than Indians need the movement" and that "...people in both [the EJM and traditional environmental] movements can benefit from Indian perspectives, grounded in tribal cultures, on how human societies should relate to the non-human, living communities with whom we share this Mother Earth." Suagee further notes many of the environmental injustices faced by Indigenous communities are parallel with those found in communities of color elsewhere: disproportionate impacts from water, land, and air pollution, unequal access to greenspaces and other environmental benefits, lack of regulatory authority, and the negative health impacts associated with all three.

However, from a legal perspective, Suagee notes three key differences. First is what he calls "structural disproportionate impacts" stemming from a general lack of environmental regulatory infrastructure and authority within tribal governments. The second relates to the outcomes of federal and state case law: when tribes do try to establish regulations in tune with their own knowledge and priorities, they frequently face litigation brought by those who believe they should not have the authority to do so. The third distinction points toward the ways in which Indigenous epistemologies

around the environment, the economy, and the role of government inform their perspectives on the role and practices of legal and regulatory institutions.<sup>14</sup>

Indeed, the ways in which Indigenous people in the U.S. experience environmental racism and injustice is in some way parallel to other people of color, but it is also distinct. As Suagee has further emphasized, the concept of EJ in tribal nations and Indigenous communities encompasses not only equal protection from environmental harms and access to environmental benefits, but also calls for greater political autonomy and self-determination, economic and regulatory sovereignty, and the ability for tribal courts to have jurisdiction in EJ disputes involving non-tribal entities.<sup>15</sup> As he notes,

Activities that damage or destroy sacred places in tribal religion inflict a unique type of suffering on tribal communities. [Harmful environmental] impacts on tribal cultures are disproportionate by definition—tribal people are affected differently because their relationship to the environment is different.

Aided by the creation of the forefront Indigenous environmentally-focused civil society group, the Indigenous Environmental Network, First Nations continue to fight against not only disproportionate exposures to environmental harms, but also land appropriation, the desecration of sacred sites, the loss of traditional fishing, hunting, and gathering rights, and continued attacks on tribal sovereignty.<sup>16</sup>

### *iii. Environmental Justice Movement Methodologies and Reform Ambitions*

Pioneering EJ lawyer Luke Cole and others have noted that EJ problems are at heart *political* problems—almost invariably, some government official or agency is allowing one actor to pollute

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<sup>14</sup> Dean B. Suagee, Environmental Justice and Indian Country, American Bar Association, Civil Rights and Social Justice publications, October 2003.

<sup>15</sup> The important distinction between Tribal Nations and Indigenous communities differentiates between citizens of sovereign, federally-recognized tribal nations and Indigenous communities who are either not recognized by state or federal governments as having political autonomy.

<sup>16</sup> Dean B. Suagee, The Indian Environmental Justice Clinic: From Vision to Reality. 23 Vermont Law Review 567 (1999).

the neighborhood of another. Accordingly, it has been noted that non-legal tactics can sometimes be more successful in generating broader public awareness of a localized issue or pressuring an unresponsive bureaucracy or corporation than lawsuits. However, the aim of this paper is to outline the ways in which litigation remains a valuable—and sometimes quite effective—tool for gaining redress and generally raising awareness of EJ issues.<sup>17</sup>

Social scientific research on the role of litigation within social justice organizing campaigns has found that lawsuits are a good tactic when groups (1) want to end a campaign and move onto another issue, (2) inspire other like groups by "showing you aren't afraid to take on these bastards", and (3) force the hand of the opposition to react to your demands during a stalemate within a larger dispute.<sup>18</sup>

There are two primary reasons EJ plaintiffs sue: (1) to gain compensation for past harm, and (2) to prevent future risk. Both these reasons come with their set of strategic goals and are associated with different conceptions of justice. One aim of this project is to trace how different conceptions of justice inform EJ organizations' and communities' decision whether or not to litigate, their litigation strategies, and their perception of litigation outcomes. In seeking to understand the varying conceptions of "success" in litigation held by EJ activists and plaintiffs, it is important to understand how communities, organizations, and the EJ movement as a whole view legal institutions and legal practitioners, as well as how the strategic goals of lawsuits fit within particular campaigns of organizations and the larger goals of the movement itself.

Many scholars in the field of environmental sociology have documented the differences between the methodologies of the EJ movement and that of the "traditional" environmental reform movement.

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<sup>17</sup> Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *Ecological Law Quarterly* 619 (1992).

<sup>18</sup> Clifford Rechtschaffen and Eileen Gauna, *Environmental Justice: Law, Policy, and Regulation* (Durham: Carolina Academic Press, 2002).

The latter are distinct primarily insofar as they are *professionalized*. Historically, and to a somewhat lesser extent today, they have been run by mostly upper and middle class white people, and have focused primarily on issues such as emissions and water pollution regulation, wilderness preservation, resource conservation, and recreation, with little or no focus on the intersection between social justice and environmental issues.<sup>19</sup>

Traditional environmental organizations often have significant financial resources and a large paid staff. They generally have access to politicians and legal professionals, and have significant lobbying capacity. In contrast, EJ organizations are grassroots-based, centered around community activism, and run predominantly by people of color and women. The work these organizations do is largely by unpaid volunteers or a small staff coordinating a wide range of initiatives and campaigns.<sup>20</sup> While traditional environmental organizations rely on methods such as lobbying campaigns, fundraising drives, and strategic lawsuits, EJ Activist tactics closely resemble that of the civil rights movement: protest, rallies, sit-ins, teach-ins, and boycotts, often organized out of churches, community centers and schools.<sup>21 22</sup>

Julian Agyeman and others have observed that the differences in scope, methodology, access to political and economic resources between the traditional environmental reform movement and the EJM has caused the latter to be typically more *reactive*—rather than *proactive*—in light of the proposal and operation of LULUs and longer-term environmental harms. He writes that “grassroots EJ groups

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<sup>19</sup> Robert Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Boulder: Westview, 1990).

<sup>20</sup> Julian Agyeman et al., “Trends and Directions in Environmental Justice: From Inequity to Everyday Life, Community, and Just Sustainabilities,” *Annu. Rev. Environ. Resour* 41 (2016): 321-40.

<sup>21</sup> Because litigation is a common method of traditional environmental groups, one focus of this Article is to identify the ways in which environmental statutes are more attuned to the types of claims these groups make than those made by EJ organizations.

<sup>22</sup> D.E. Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility* (New York: NYU Press, 2014).

are often lacking in their ability to frame the issue, seize on political opportunities, and mobilize the political and financial resources needed to be more proactive." Lawsuits which aim to gain redress for past harm are inherently reactive, while lawsuits which seek to mitigate against future risks—like those that challenge permitting decisions by agencies—are also reactive in nature, but have an element of proactivity in the sense that they can stop harm before it takes place. Here I built off Agyeman's important observation to examine the extent to which lawsuits can add an element of proactivity to the work of EJ organizations and communities.<sup>23</sup>

Political theorists and environmental sociologists have examined the way in which particular conceptions of justice inform both the priorities and methodologies of EJ communities and organizations, as well as the EJM as a whole. David Schlosberg argues that the EJM's vision of justice is pluralistic and incorporates four ideas of justice that are not mutually exclusive. First, in line with egalitarian frameworks established by John Rawls and others, EJ advocates call for redistributive reforms that redress long standing inequitable allocations of environmental harms. Second, as Nancy Fraser and Iris Young have observed in other burgeoning social movements, Schlosberg emphasizes that the EJM "calls for recognising, accounting for, and combating undeserved cultural relations of group-based oppression and privilege" that have rendered environmental injustices commonsensical and inescapable in certain communities, while other's "enjoy the privileges of freedom and respect, and freedom from hazards."<sup>24</sup>

Third, the EJM's vision of justice requires increased "participatory parity" so that underrepresented individuals and groups are able to be full participants in scientific research, local

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<sup>23</sup> Agyeman et al., "Trends and Directions," 321-40.

<sup>24</sup> Jill Lindsey Harrison, "Neoliberal Environmental Justice: Mainstream Ideas of Justice in Political Conflict Over Agricultural Pesticides in the United States," *Environmental Politics*, 23, no. 4 (2014): 650-669.



environmental decision making, and regulatory agenda setting. Fourth, EJ advocates see an increased role of government in bolstering access to the goods, services, and opportunities needed to be full members of democratic society, like affordable housing, adequate and healthy food, public transportation, and political and scientific literacy. As we shall see, these four elements of the EJM's vision of justice manifest in localized EJ campaigns. When such campaigns turn to the courts, these four elements may inform the types of legal claims EJ plaintiffs make, how their lawyers construct their legal arguments and briefs, and how notions of "success" are conceptualized in a lawsuit.<sup>25</sup>

## **II. Challenges of Accountability: Regulatory Ambivalence and Agency Capture**

The perspectives of justice that guide the values and methodologies of the EJM as a whole focus on three primary deficiencies of environmental law and regulation: (1) the failure to explicitly provide substantive environmental protections for Black, Indigenous, and communities/people of color, the urban poor, and disenfranchised rural communities, (2) general inequality and disproportionality in access to environmental benefits and protections from environmental harms and the negative externalities condoned by relevant regulatory frameworks, and (3) the inability for minorities and the poor to actively and effectively participate in environmental decision making processes. While individual lawsuits cannot alone rectify these structural shortcomings, they can instead act as key mechanisms—working in conjunction with other forms of resistance— through which

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<sup>25</sup> *See generally*: Schlosberg, D. *Defining Environmental Justice: Theories, Movements, and Nature*. Oxford: Oxford University Press (2007). *And*: Schlosberg, D. *Theorising Environmental Justice: The Expanding sphere Of a Discourse*. *Environmental Politics*, 22 (1) (2013), 37–55.

progress toward the end goals of greater legal protections, regulatory equity, and public participation can be achieved for EJ communities.<sup>26</sup>

Media coverage of early direct actions like the Warren County protests led to increased public awareness of EJ issues, and catalyzed a powerful response amongst grassroots EJ organizations. Much like with the Civil Rights Movement, faith-based and community organizations played a relatively prominent role in early EJ activism. In 1987, the United Church of Christ (UCC) Commission for Racial Justice published the report *Toxic Wastes and Race in the United States*. This report, in combination with the General Accounting Office's (GAO) report *The Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surround Communities*, provided early groundwork for the EJ canon.<sup>27</sup>

As demonstrated in the figure below, early activist pressure and civil society organizing translated into swift formal action on EJ at the federal level, which to this day still provides some of the most substantive EJ regulatory protections.

**Table 1 How UCC recommendations translated into federal-level action**

United Church of Christ recommendation	Federal-level action
Executive Order from the President of the United States mandating that federal agencies consider the impact of current policies and regulations on racial and ethnic communities	In 1994, President Clinton signs Executive Order 12898 mandating that "[E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations"
Formation of an Office of Hazardous Waste	In 1992, the EPA creates the Office of Environmental Equity (later renamed the Office of Environmental Justice)
Establishment of a National Advisory Council on Racial and Ethnic Concerns within the EPA	In 1993, the EPA establishes the National Environmental Justice Advisory Council

Abbreviation: EPA, Environmental Protection Agency.

Figure 5 . How UCC recommendations translated into early federal action. (Agyeman et. al, 2016)

<sup>26</sup> Tseming Yang, *Environmental Regulation, Tort Law and Environmental Justice: What Could Have Been*, 41 Washburn L.J. 607 (2002).

<sup>27</sup> The General Accounting Office is now the Government Accountability Office.

This link between grassroots activism, civil society organizing, and federal action on EJ is emblematic of the early methodology and success of the EJM. However, despite these initial steps by the Environmental Protection Agency (EPA) and other federal agencies, the substantive execution and incorporation of the UCC and GAO recommendations into administrative rulemaking and regulation has been slow and ineffectual.<sup>28</sup>

As Bullard has noted, during the Bush Jr. (and later Trump) administrations, EPA undermined the EJ principles established in the 1990s, including the agency's obligation to implement Executive Order 12898 or enforce Title VI of the Civil Rights Act pursuant to the order's accompanying presidential memorandum. This gap between symbolic legislative, policy, and regulatory actions and their substantive enforcement—what some scholars refer to as being a gap between law in the books and law in practice—is pervasive in environmental law and regulation.<sup>29</sup>

Jill Lindsey Harrison's research provides perhaps the most comprehensive scholarly account of EJ reform efforts within federal and state agencies. Focusing specifically on the case of EPA, Harrison reveals how agency (un)accountability emerges in three key areas: (1) rulemaking, (2) permitting, and (3) enforcement, and argues that the greatest unaccountability stems from a "lack of institutionalization" of EJ principles and considerations. One respondent in Harrison's study "repeatedly asserted " that "permitting is the holy grail of integrating EJ into regulatory practice. Harrison found that EJ activists criticize federal and state permitting processes for being "overly

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<sup>28</sup> Agyeman et al., "Trends and Directions," 321-40.

<sup>29</sup> In 1994, President Clinton issued Executive Order 12898 to "establish the responsibility of each federal agency to make achieving [EJ] as part of its mission". An accompanying Presidential Memorandum directed that human health, economic, and social effects, including effects on minority communities and low-income communities, be included in the analysis of environmental effects pursuant to NEPA. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. ("Title VI") Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds.

*See generally:* Robert Bullard, *Unequal Protection: Environmental Justice and Communities of Color* (San Francisco: Sierra Club, 1994).

influenced by regulated entities" and advocate for the greater ability of disproportionately burdened communities to impact permitting decisions.<sup>30</sup>

Harrison has further written about the ways EJ advocates and EJ-supportive agency staff members conceptualize effective regulatory action in comparison with high-ranking, canonical agency staff and administrators. EJ activists and EJ-supportive staff generally assess the efficacy through the lens of *egalitarianism*, positing that "agencies should strive to reduce inequalities among communities and devote a *disproportionate* share of resources toward helping communities that are the most burdened with environmental problems and most vulnerable to their effects." Many agency administrators see it differently, arguing that agency actions should be assessed on the basis of *utilitarian* principles, ensuring the greatest good for the greatest number of people, a conviction that Harrison notes permeates through much of U.S. environmental law, regulation, regulatory culture, and "mainstream" environmentalism.<sup>31</sup>

### **III. The Role of Lawyers in the EJM**

Just as social justice movements can be skeptical of legal institutions, social justice activists and organizations can be skeptical of legal practitioners. In one regard, lawyers often play an invaluable role in advocating on behalf of marginalized communities. However, deep distrust of lawyers and legal procedures on the part of activists and community residents can cause sharp divides *within* communities when discussing whether litigation is the right means of advocacy and disputing for them or not. Many EJ community organizations and Indigenous rights groups do not have lawyers on their

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<sup>30</sup> Jill Lindsey Harrison, *From the Inside Out: The Fight for Environmental Justice Within Government Agencies*. Cambridge, MIT Press, 2019.

<sup>31</sup> Jill Lindsey Harrison, *From the Inside Out: The Fight for Environmental Justice Within Government Agencies*. Cambridge, MIT Press, 2019.

staff, if they have paid staff at all. "Traditional" environmental organizations, however, often do. Still, many EJ and Indigenous organizations rely on litigation as a tool in their various campaigns.<sup>32</sup>

Because not all environmental injustices are grounds for a lawsuit, scholars and movement lawyers have suggested that litigation is not always the right choice for afflicted communities. The first question, therefore, that lawyers must answer for clients is whether litigation is a good idea, or whether it is even possible at all within their particular circumstances. Accordingly, Cole provides three key questions lawyers should consider when advising clients on whether to litigate: (1) Will a legal strategy *educate*?—employing a broadly constructed conception of education encompassing the public, the judiciary, the relevant administrative agencies and corporations, and the plaintiffs themselves? (2) Will a legal strategy *build the movement*?—will litigation draw in additional supporters of the cause and galvanize support and cooperation across similar organizations and campaigns? (3) Does the legal strategy address the *causes*, instead of just the symptoms, of the problem?— legal solutions to the environmental problems of the poor and marginalized often only treat symptoms (the environmental hazards themselves). Crucially, lawyers should seek to ensure that legal strategies embrace and work in conjunction with non-legal strategies, and aim to the greatest extent possible to expose and address the root causes of the environmental problems faced by their clients.<sup>33</sup>

Cole's "client empowerment model" of social movement lawyering diverges significantly from what is sometimes called the "legal-scientific" model of lawyering employed by traditional environmental groups.<sup>34</sup> Client empowerment in EJ litigation (and social justice litigation more

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<sup>32</sup> Rechtschaffen and Gauna.

<sup>33</sup> Luke Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 *Ecological Law Quarterly* 619 (1992).

<sup>34</sup> The "legal-scientific" model involves the application of a very specific set of scientific data to a legal question, which is subsequently analyzed in context with relevant statutes and regulations. In the EJ context, diverging from this model can involve not only involving drawing on scientific data, but also considering a communities own specific priorities, worldviews, and normative claims, regardless of whether they are compatible with specific legal claims.

broadly) requires employing modes of communicating with clients and disputing with other parties in ways that are "community-based" or "community-led", and actively seeks to decentralize power away from the lawyer and toward the clients. This model does not have come at the expense of incompletely drawing on the lawyer's legal expertise, but rather requires that knowledge and decision-making power in disputing processes don't always stem from the same source.<sup>35</sup>

Cole's legal scholarship also outlines what he refers to as a "litigation hierarchy" that he garnered from his and his colleagues years of EJM lawyering. Ordered from most to least effective, the categories of legal claims are as follows: (1) Environmental statutory or procedural claims "straight up," (2) unique interpretations of environmental or civil rights statutory law, usually those requiring some sort of participatory processes, (3) civil rights anti-discrimination statutes, and (4) constitutional claims. Cole considers these both in regard to efficacy in gaining particular redress around particular issues, but also advancing larger EJM goals.

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<sup>35</sup> Luke Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 *Ecological Law Quarterly* 619 (1992).

## Part One

### **Equity and Identity-Based Articulations: The EJ Frame in Grassroots Advocacy and Litigation**

What makes an EJ lawsuit an EJ lawsuit? Here I begin to empirically trace the use of what I will refer to as the "EJ frame" in both grassroots activism and litigation. In essence, the EJ frame refers to rhetorical and discursive lenses that explicitly examine issues of environmental management and politics explicitly through social justice lens. To this end, all environmental issues are EJ issues to some degree or another.

Because the EJ frame ultimately rooted in ideals of social equity, its use in organizing and litigation centers on three important goals: (1) leveraging the putative equality in the courtroom in light of stark "real world" power differences between litigants, (2) attempting to get elements of narratives of (in)equity and the EJ frame included in judicial opinions, and (3) seeking particular types of legal remedies that are uniquely situated to address the harm communities have experienced. Here I draw on my interviews and content analysis to characterize an EJ lawsuit in contrast to a standard environmental lawsuit, examine the contexts in which the EJ frame is used and not used in litigation, and look at the challenging role that lawyers play in translating the EJ frame into effective legal claims.

#### **I. The EJ Frame in Grassroots Activism**

To better understand what the EJ frame is and the role it can play in litigation, it will first be helpful to look at its use in grassroots activism and non-legal forms of advocacy examined in my research. Many EJ organizations employ a version of the EJ frame that effectively combines the findings of EJ scholarship and the experience of EJ communities.

Jim Irby is a network organizer at the Coming Clean Network, a network of hundreds of EJ organizations, ranging from small grassroots campaigns like Concerned Citizens of Wagon Mount and Mora County, New Mexico to large nation-wide organizations like Greenpeace and EarthJustice. In our conversation, he emphasized the importance of clear, consistent messaging by and among organizations when advocating around a particular issue, such as the negative health effects of petrochemicals in industrial agriculture. When I asked him to concisely describe the sort of public messaging they put out, he said they employ the perspective that

Environmental health issues do not impact people equally, and that is based not on happenstance but on the actions of political institutions going back decades and centuries, and on racist rhetoric and redlining that caused it to be primarily people and communities of color that are around the most industrial facilities. Drawing from the work of Robert Bullard, we see that race is such a predictor of whether communities will have toxic or hazardous facilities there.

Coming Clean's network model exemplifies the challenge and importance of keeping messaging consistent, while also incorporating the wide range of experiences and perspectives that comprise the EJ frame on a national level.

Another highly-effective element of EJ frame messaging that Irby emphasized is demonstrating the compounding nature of environmental injustice. He stressed that the technocratic nature of environmental regulation can easily ignore compounding exposures to environmental harms that certain communities suffer, requiring messaging that denotes compounding inequities.

Multiple chemical exposures often means that you will get sicker by having these two or three exposures rather than just one... The regulators are looking at it chemical by chemical—what's safe for *this* particular facility to emit. You know, the fact that the facility is across from ten others and there's a highway that runs through the middle, it's not seeing the full picture.

While a particular advocacy campaign may focus on blocking the siting of a particular facility or raising public awareness about a particular issue, every successful EJ campaign must contextualize itself within



the larger trends of inequity and injustice that provide the backdrop and impetus for community and ideally subsequent governmental action on an issue.

Another important aspect of the EJ frame used in both grassroots campaigns and in litigation is what I will refer to as "equity-and identity-based articulations." In the EJ context, these rhetorical and moralistic strategies draw on particular spatio-temporal conceptions environmental and social equity, historicities of group oppression, and particular group relationships to natural and built environments. The EJ activism of Indigenous people in Alaska captures such articulations well. Pamela Miller is the founder and executive director of Alaska Community Action on Toxins (ACAT), an Indigenous women-led EJ and environmental health research and advocacy group based in Anchorage.

Miller told me that in both their advocacy and litigation, ACAT employs the EJ frame in articulations surrounding the unique nature of EJ concerns in the far north.

We work on transboundary issues, because of our position in the north, and in the Arctic, which is a hemispheric sink... Indigenous peoples in the Arctic have some of the highest body burdens of these chemicals of any population on Earth. We work from the local to the international level to change policy. These chemicals don't see any political boundaries.

These sorts of accounts, rooted both in lived experiences and unique epistemologies of Indigenous communities and in the knowledge of the climate and toxicological sciences, are integral to framing why certain groups need additional regulatory protections. Using these types of ways of knowing—which are often vindicated by scientific accounts—in grassroots organizing can lead to a greater public awareness of how localized issues of environmental quality intersect with broader questions of social justice. As we shall see, they can also be highly effective in court.

## II. Bringing the EJ Frame into the Courtroom

"There is no EJ statute," Jan Hasselman, senior attorney at Earthjustice and lead counsel for the plaintiffs in *Standing Rock* reminded me at the beginning of our interview. There's not a lot of statutory claims to hang your hat on," Hasselman emphasized, "historically, EJ has been a subcategory of environmental issues. There's water pollution, air pollution, endangered species, and then there's *people*."

People, it is clear, neither easily fit into the views and methodology of the traditional environmental reform movement, nor do they fit neatly into existing environmental jurisprudence. This general lack of statutory basis in EJ litigation has two important effects. First, it creates a reliance on procedural claims, rather than those rooted in statute, or forces plaintiffs and attorneys to stretch the bounds of existing interpretations of the law. Second, it can require use of the EJ frame in the courtroom.

Often, EJ lawsuits are EJ lawsuits not because of the legal questions at hand, but rather because of *who* the litigants are. In Jan Hasselman's words, "it's about who you are representing and the story they are trying to tell." Hasselman recounted bringing a case on behalf of the Suquamish Tribe against the King County drainage district for their repeated discharge of improperly treated wastewater into Puget Sound. He noted that the very same case could have been brought on behalf of a traditional environmental organization like the Sierra Club, and from a strictly legal perspective, the case would have been essentially the same. The role of equity and identity-based articulations in this case, which centered around the traditional subsistence practices of the Tribe, are what made this an EJ case, rather than a simple question of environmental law.

*i. Kivalina: A Decision to Use the Common Law "Straight Up"*

Deciding whether to employ equity and identity -based articulations within legal arguments requires a strategic choice on the part of plaintiffs and their lawyers informed primarily by the type of legal claims available to them and the legal framework in which they are working. In *Kivalina*, the plaintiffs, represented by the Center on Race, Poverty, and the Environment (CRPE) decided against incorporating the EJ frame into their legal arguments, relying strictly on their interpretations of the breadth of federal common law public and private nuisance claims.

Jeff Todd is an EJ legal scholar and law professor at Texas State University. He sees a key role for rhetorical strategies in EJ litigation. Reflecting on what he sees as the legal shortcomings and non-legal advocacy successes of *Kivalina*, Todd put it this way:

If you're on the community side, it might seem like playing it safe is the way to go. You know, just talking black letter law, showing that you're neutral, and that might work to your advantage. But that's what they did in *Kivalina*, and that did not work. The trial judge wasn't moved by anything, the appellate judges weren't moved by anything... They didn't really talk about the fact that they are a federally-recognized Native village, that they are trying to live traditional lifestyles. You can read about a lot of that in the media reports about the case, but in their actual filings they didn't mention that much at all, so there was nothing really to connect their unique status as Indigenous peoples with the lawsuits and what was happening in their community.

Numerous counterfactuals could be considered as to how things could have gone differently in *Kivalina* if the plaintiffs had more thoroughly integrated their indigeneity into their arguments; that is not our purpose here. Indeed, "talking black letter law," and incorporating climate science into their arguments was a strategic decision on the part of the plaintiffs and CRPE, and one not without justification.

Brent Newell, formerly of CRPE and counsel for the Native Village of Kivalina in the case, told me that part of the rationale behind this decision has to do with the sort of relief the community

was seeking. Common law public and private nuisance claims were well suited to the community's goal of gaining monetary compensation to relocate off the barrier island. The decision not to more comprehensively include elements of the EJ frame into the briefs and arguments of *Kivalina* did not stem from a lack of community engagement. In addition to spending a considerable amount of time in the village over several years, forming friendships with community members and experiencing life in the Arctic, Newell was the designated interlocutor between CRPE, the City of Kivalina, and the Native Village of Kivalina Indian Reorganization Act Council (see figure 6). Indeed, the decision to employ both climate science and environmental law "straight up," saving EJ frame articulations for other areas of disputing and advocacy, was a deliberate and mutual decision between the community and their lawyers.



Figure 6. Attorney Brent Newell (left) speaks with Enoch Adams, Jr. (with guitar), Kivalina resident and plaintiff in *Kivalina*, in his home in Kivalina, Alaska in 2014. (DeSmog)

However, just because a legal claim fits neatly into the sort of relief sought, it doesn't mean that judges will find it compelling. The judges in *Kivalina*, Jeff Todd believes, were looking for a "more

novel application of the law" which would better compel the judges to act to protect their interests. More robust use of the EJ frame, it seems, could have been beneficial. While the plaintiffs and their attorneys saw room within the federal common law to accommodate their claims, the courts did not.

*ii. Hawai'i: Where the use of the EJ Frame is Necessary*

Certain legal frameworks and jurisdictions are more receptive to the use of EJ frame articulations in litigation, and in certain contexts, their use can be necessary in order to make certain legal claims, as is the case in Hawai'i state law. Isaac Moriwake is the managing attorney at Earthjustice's Mid-Pacific Office in Honolulu, where he has extensively litigated in his office's water rights practice. As he explained, his program uses Hawai'i state law to restore instream flows to rivers and streams that were "historically diverted by the big oligarchical plantation owners and their descendants." Moriwake emphasized that the way this program operates is uniquely Hawaiian, not only in terms of the narratives articulated but also in regard to the way they use the law.

The primary objectives of the program are to protect the ecological values of flowing streams while upholding the legally -recognized rights of the Native Hawaiian people who rely on the streams to grow their traditional subsistence crop, kalo (taro). Earthjustice's work also aims to protect the nearshore marine life that rely on these streams as sources of food and nutrients, which in turn provide food sources for local human populations. What is particularly unique about this program is its use of Hawai'i's public trust doctrine. "We have established a leading legal precedent based on the public trust doctrine, which in Hawai'i is probably the most advanced version of that in the nation, if not the world," Moriwake said. He informed me that Hawai'i's public trust doctrine is actually carried over from Indigenous customs and pre-colonial Hawaiian Kingdom law, which explicitly recognizes water

as a public trust; something which can never be privatized. "It's an expression of pre-contact, pre-colonization sovereignty, in a sense," he said.

Employing the EJ frame and equity and identity-based articulations under the public trust doctrine under Hawai'i state law is not only useful, it is arguably necessary. Moriwake emphasizes that in the stream restoration cases, community-based narratives—which focus both on Native Hawaiian identity and historical inequities—are often necessary for Earthjustice and their clients to establish standing and a right to due process under these sorts of claims or contextualize other legal claims with the provisions of the public trust doctrine. Because the efficacy and appropriateness of EJ frame articulations in litigation is dependent on a variety of considerations largely rooted in legal jargon and procedural questions, lawyers play a key role in this decision making process and translating what is at stake in the courts to their clients.

### **III. Power Differentials Between EJ Litigants; Community Concerns About Engaging With the Courts**

One fairly generalizable characteristic of EJ litigation is the differences in social, economic, and political power held by the two litigating parties: plaintiffs are members of marginalized communities and particularly socially and economically vulnerable sections of society, while defendants are usually large and powerful corporations, governmental agencies with significant delegated powers, or, in some cases, the United States itself. Private sector defendants often derive significant profit or benefit from

their activities, while plaintiffs derive little or no benefit while bearing the brunt of environmental harms.<sup>36 37</sup>

When Chad Oba, a resident of Union Hill, Virginia, found out that the Dominion air compressor station was slated to come to her neighborhood, she immediately thought of her husband, who works outside up to twelve hours each day. She also thought of her neighbor, an older Black woman, who had been born and raised nearby and recently retired to her present home. She would live closest to the station, just 150 yards from her property "It was going to destroy her life," as Oba put it.

Oba quickly learned that other people and organizations in neighboring counties were also beginning to organize to fight the pipeline. The personal stake she had in fighting the compressor station led her to found Friends of Buckingham. "We were being saddled with an enormous pipeline," she says, "not only did I not want a giant pipeline running near my property, we were going to be poisoned on a daily basis from the toxic air emitted by a giant compressor station." As will be more closely touched on below, litigation was not the first tactic that came to mind; direct action campaigns, petitioning, and community meetings played a central and enduring role in the larger campaign. However, as relates to the present discussion, it is important to note that when Friends of Buckingham and the Southern Environmental Law Center collectively came to the realization that they had grounds for a case, there was reportedly significant concern among the community regarding engagement with the legal system as a means to stopping the pipeline. Oba emphasized that this

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<sup>36</sup> It would behoove me to emphasize the role that large, multinational corporations—often with the blessing of government and regulatory agencies—play in creating and perpetuating environmental injustice, environmental degradation, and anthropogenic climate change in general. Research indicates that the richest corporations in the world are the largest emitters of greenhouse gasses (GHGs). Over two-thirds of the global industrial carbon pollution since 1854 can be traced back to just 90 corporate entities, 48% of which can be traced to just 20 oil, gas, and utility companies; among them are Royal Dutch (Shell), Chevron, and ExxonMobile. Conversely, it has been proven that people in the Global South, small island nations, and the urban poor will face—and are in some cases already facing—the disproportionate impacts of climatic effects which directly stem from these emissions.

<sup>37</sup> Jeff Todd, *A Sense of Equity in Environmental Justice Litigation*, 44 Harv. Envtl. L. Rev. 169.

concern was largely around the perceived potential for retaliation, regarding which Oba went as far as to invoke the history of lynching and burning of the local courthouse to erase records during the Freedmen reparations in the area.

As we will see, this concern was in part mitigated over time through the development of trust between SELC and the community, by the urgency of the case, and the legal victories that were ultimately attained in court. However, what is important to consider here is that litigation is not only generally not the first forum EJ constituencies turn to, but also that there exists significant distrust of courts and lawyers, and skepticism about the extent to which litigation can bring about the sort of redress and justice communities are seeking.

The formalities of courts and legal processes can confer a sense of procedural equality between litigants. During litigation, EJ plaintiffs are afforded the opportunity to articulate their plights to powerful social institutions and actors, such as federal circuit courts and their panels, to an extent not possible in most other forums. However, equality before the law that a courtroom setting provides does not easily eliminate "real world" differences in wealth and power. This can compel EJ plaintiffs to use the EJ frame in their litigating to show more empirically—rather than just in legal terms— why courts should act to protect their interests. *Standing Rock* is an excellent illustration of this dynamic. When I asked Hasselman about how he saw the power dynamic played out between litigants in the case, he responded,

The power differential is everything. These are global fossil fuel corporations that have insane political influence at every level. It's only in the courtroom that you see some kind of parity. In the courtroom, my little EJ client is on equal footing with the oil giant, or the U.S. government. They are probably on more equal footing in litigation than any other setting. In what other forum could we have even conceivably gotten an order to shut down a pipeline carrying 7% of the U.S.'s crude oil supply?



The equal footing provided before the law provides a level of parity that is not found in other forums of public disputing. When the federal court ordered the DAPL pipeline to be shut down and emptied of oil, it sent the message that the priorities of the tribe were equally as important as those of the government and DAPL.

However, this sort of parity during litigation does not ensure the same sort of equality *before* and *after* the litigating ends. Mike Donofrio is senior partner at Stris and Maher LLP with a robust pro bono practice, and member of what some call the "social justice bar." When I asked him about the relevance of the stark differences in wealth and power between litigants in cases with social justice implications, he indicated that one key area this emerges in is the pre-trial discovery process. Because, in EJ lawsuits, and indeed social justice litigation more broadly, the defendants are often represented by large law firms well endowed with human and financial capital, defense lawyers can gain a significant advantage before cases even go to trial, forcing plaintiffs' attorneys to respond to numerous discovery requests. This is expensive for clients paying for legal services, and burdening for plaintiffs' attorneys working on a pro-bono basis. Donofrio believes that if there were a way in which to streamline and "filter out unduly burdensome or harassing uses" of the discovery process, it wouldn't necessarily completely erase defendant-plaintiff power differentials, but it would at least level the playing field to a certain extent.

Also, power differentials can have significant impacts before a case even gets to trial. Jeff Todd began his legal career working at a large law firm, and worked on legal teams representing the defense side of pesticide exposure cases brought against Dole during the 1990s. These cases were toxic tort cases that dated back to the 1970s, when the EJ frame was just emerging in activism and politics.

Professor Todd told me that in these cases the power differential played two roles from the defense perspective. The first was a deliberate avoidance of engagement with discursive elements of the EJ frame. "In my first foré into EJ", he tells me, "we didn't even use the term EJ, because we represented the defendant." He emphasized that reducing an EJ dispute into a purely legal dispute is easy when you are the defense side, though not so easy when you are a plaintiff.

My conversations surrounding the importance of rhetorical elements of EJ legal claims with Todd illuminated the extent to which this reduction is streamlined if the defense can have a case dismissed as quickly as possible, before the plaintiff has their chance to tell their story before a judge. He noted that "on the defense side, we said 'we're not going to trial, we're going to defeat that claim as early as possible,'" and went on to say, "we were very much trying to win early in the proceedings, and win on the papers, whereas the plaintiffs want to push the issue as long as they can, whether toward a settlement or a monied judgment." In other cases, it may be advantageous for defendants to draw on the case as long as possible in order to force a settlement agreement, if that is seen as being more advantageous for them. Indeed, as Hasselman noted "there are lots of horrible examples of that, particularly in regard to compensation and monetary damages. The defendants draw out the case for so long that the people are already dead."

The power differentials between EJ litigants and community concerns regarding engagement with the legal system demonstrate some of the ways litigation is not an equal playing field at the onset. Whether defendants have a clear incentive to "wrap up" disputes as fast as possible, or draw out a case to their advantage, the defense is generally the party that has the most control of the proceedings. The greater legal and economic resources held by defendants and their ability to more impactfully control the trajectory of litigation is one consideration EJ plaintiffs and their lawyers must consider when

deciding whether, and to what extent, to employ the EJ frame in court. However, as we shall see, the equality before the law provided by the litigation forum allows for a certain parity that is vital to the larger instrumentalization of litigation within EJ advocacy. Lawyers, too, play a key role.

#### **IV. Lawyers as Mediators and Translators of the EJ Frame**

Leveraging equity and identity-based articulations so that they can have the greatest effect is a shared responsibility among lawyers, plaintiffs, and community organizers. As Moriwake emphasized in our interview, "in any community-based lawyering, particularly in EJ, it's all about the storytelling, all about the narrative." How you use that depends on the legal framework you're dealing with, but there always has to be a marriage between the law and the facts. If there isn't, either you need to find a different law, or you need to find different facts."

"Finding different facts" in the EJ context requires lawyers and their offices to directly engage with plaintiffs' communities, incorporating first hand accounts of their plights to include in briefs. It requires a deep understanding of how the communities see the injurious experiences they have experienced and the type of remedies they seek from *both* legal and non legal perspectives. These conversations can be emotionally fraught, sometimes contentious, and are fundamentally characterized by the general lack of direct experience that lawyers have with the injuries being discussed. While lawyers must "translate" community demands into legally-palatable arguments, this can be an extremely challenging prospect.

One challenge, particularly in the *Standing Rock* and *Kivalina* contexts is not only the historically fraught relationship between courts and social justice movements, but also the way in which the U.S. legal system has consistently been a playing field for the dispossession and subjugation

of Indigenous people in America. Jan Hassleman's experience as lead counsel for the Standing Rock Tribe speaks to the challenge of incorporating community priorities into legal claims:

I will say, it's fucking hard. It is fraught, and there are many layers of distrust and history that feed into it... Part of it is because I'm a white man. Put a floppy hat and a mustache on me and I look like [George Armstrong] Custer. I'm standing in front of the Tribal Council telling them things about legal claims within a settler colonial legal system that they barely recognize the validity of. Why should they trust me, why should they trust this bullshit legal system that has done one thing and one thing only consistently—dispossess and disempower them. On any day of the week I could be fired by the Standing Rock because they just don't believe me. It's just a messy conversation.

Jan explained that in 1868, the federal government signed the Treaty of Fort Laramie with the Sioux, which legally recognized Native sovereignty of a huge swath of unceded lands in what is North and South Dakota, Colorado, Nebraska, Montana, and Wyoming. However, over time, with the blessings of all branches of the federal government, the U.S. violated that treaty (see figure 7). "They broke the treaty and stole the land", he says, "and the Supreme Court upheld that." To this day the Standing Rock Sioux hold the conviction that the land was stolen—in both legal and moral terms—and have incorporated this conviction significantly into their messaging and advocacy around the pipeline contention.

As Hasselman explained, "there were many people who were furious that I wasn't bringing a trespass claim against the pipeline. I told them— 'our legal system doesn't recognize the land as yours.' It was taken away and the Court upheld that." The Tribe's indigeneity and close historical connection to that land are central components of the equity and identity-based articulations that they make in the court of public opinion. However, bringing these into the legal courtroom in an effective manner is more challenging.

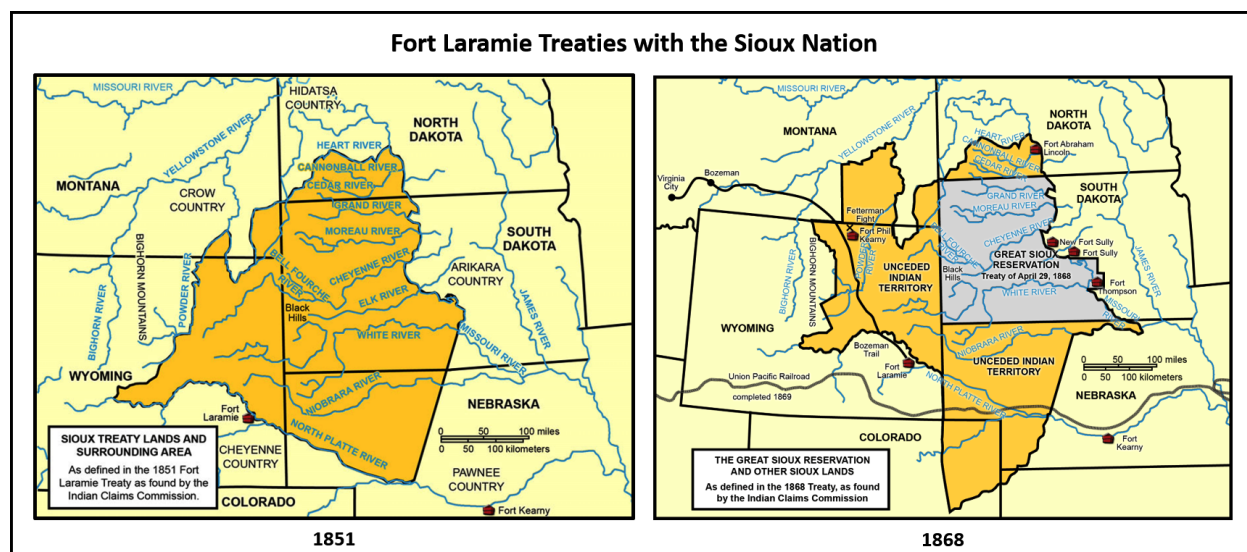


Figure 7. Developments in the Treaties of Fort Laramie and Reduction of sovereign Indian Territory 1851-1868 (State Historical Society of North Dakota).

Another aspect of EJ litigating that can complicate or preclude the use of equity and identity-based articulations has to do with the professional and ethical responsibilities of lawyers, and the tendency for community members to have limited legal literacy. As Hasselman emphasizes, communicating clearly and early to clients what is legally feasible is extremely important. However, "when [community members] turn back around to you and explain the magnitude of the problem," he says, "the two things just don't match up."

Mike Donofrio agrees, and noted that he often "feels like the wet blanket" when telling clients that the entirety of their situation likely won't be able to be addressed by the litigation alone, or that components of their broader story might not be found to be compelling in court. He poignantly notes the challenge of telling a client that "as absurd as it might sound to them, you're not going to get everything you want from the litigation for whatever reason, especially when it's something technical like lack of standing." He believes that the worst thing one can do as a social justice lawyer is "lead a client down a primrose path, and disappoint them in the end," poignantly noting that "it is better to

disappoint them from the outset." Being realistic with clients, particularly those who are relying on litigation as a last resort in the face of injurious experiences, can be a challenging prospect for movement lawyers. However, being clear about what is legally possible and the extent to which elements of the EJ frame will "fly" in court is vital to an effective client-central mode of lawyering, allowing community members to construe their other forms of organizing and resistance accordingly.

The efficacy of pairing legal tactics with non-legal ones is in part reliant on certain modes of lawyering and on certain dynamics of lawyer client- relations, particularly how lawyers interact with various forms of community organizing and incorporate that into their work. While this in part depends on the law firm, the case, and the personal activist convictions of certain lawyers, it is clear that lawyer-centric models—what some of my respondents called "litigating in a vacuum"—often fall short. While this sort of litigation might work to gain redress or accountability around an isolated issue of injustice, it falls short in facilitating the sort of democratic participation via litigation which this section aims to address.

Some of my respondents spoke to what they saw as the shortcomings of law and lawyer-centric models of litigating, what the late Luke Cole referred to as the "macho law brain." While in *Standing Rock* and *Friends of Buckingham* we see relatively effective collaboration between lawyers and the community, and between legal and non-legal tactics, Brent Newell, Cole's mentee, stresses that he's "seen the way in which litigation can disempower communities" by detracting focus away from larger movement goals and failing to draw on narratives within the larger EJ frame. Even as a lawyer, Newell is wary of putting too much faith in lawyers and legal processes.

Part of this has to do with the way in which judicial decisions can be reversed on appeal, and the way in which defendants, such as corporations and agencies who are repeat offenders vis-a-vis EJ

issues, can begin to anticipate lawsuits and deter their efficacy. Early in Newell's career, CRPE was filing lawsuits against counties in the San Joaquin Valley over their permitting of large, factory farm dairy operations. He notes that at the time, CRPE did not have very much community organizing resources, and the level of community involvement in the litigation was less than that which he has seen in more successful campaigns. Newell explained that initially these legal efforts were quite successful because the counties' environmental review processes were initially not comprehensive enough to survive targeted litigation under the California Environmental Quality Act (CEQA).<sup>38</sup>

Through these lawsuits, CRPE was able to "hold up" over a hundred factory farm operations for four years. However, as he explains, CEQA essentially says "you can do whatever you want as long as you tell us you're doing it." Eventually, the legal strategies became less effective because the county governments began to anticipate these lawsuits and pour money and resources into getting the farms past the environmental review process. When left to the courts, what the counties were doing was legally sound. In the absence of robust community organizing campaigns alongside the lawsuits, these disputes were reduced to simply legal ones, rather than something with larger political and moral implications.

Other lawyers I spoke with agreed that direct engagement and consultation with the affected community is key to both a successful lawsuit and larger organizing campaign. One woman I spoke with, who does more "traditional" environmental lawyering, noted that for lawyers like her, working on an EJ case requires a bit more community engagement than they may be used to:

Being an environmental lawyer, sometimes your client is a little amorphous. If you are representing an agency or an organization, you're sometimes sort of representing yourself. But if you're working on an EJ case, representing a community, they need to be your focus, your primary priority. It's super important to communicate with the community and figure out what they want, what's important to

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<sup>38</sup> Public Resources Code 21000–21189 and the CEQA Guidelines (California Code of Regulations, Title 14, Division 6, Chapter 3, Sections 15000– 15387).

them, because it wouldn't be legally right to bring a case and ignore what the community is actually interested in.

In aligning community engagement with what is "legally right", she is alluding to the notion that such engagement fits well with the ethical and professional obligations of lawyers. Not everyone I interviewed agrees with this, or at least thinks it's easy to do.

While plaintiffs and activists are the origins of the activist sentiment of a campaign, in social justice litigation writ large, Mike Donofrio noted, "the passion for the litigation itself is coming mostly from the lawyers." For Donofrio, incorporating community engagement into the litigation process and considering how he can contribute to larger secondary effects of the litigation process sometimes comes into tension with his professional obligations.

To be candid, it's less about you [as a plaintiff] and more about, 'I have a job to do and I have to do it to the best of my abilities.' Involving you as a plaintiff in that process is less of a priority than making sure I read every case, every filing, because we have to— it is our ethical duty in our profession to zealously represent you.

Donofrio believes that more comprehensively including clients into the pre-litigation process "is somening the social justice bar could do better on." According to Chad Oba, the efforts of SELC lawyers in *Friends of Buckingham* to exactly what Donofrio finds challenging was a major reason for the case's success. She notes that many of their attorneys would come to their rallies, meetings in churches and community centers, and other campaigning efforts. This not only built trust between the community and the law firm—a level of trust that was evidently not present in *Standing Rock*— but also exposed the lawyers to the very roots of the cause that they were advocating in court. It allowed for a more cohesive application of the EJ frame articulations being made by the community into the legal arguments.



Clearly, the limitations of both legal tactics and legal professionals clarify the vitality of community organizing and various forms of non-legal advocacy in advancing community priorities should cases fail in court, or defendants start to anticipate lawsuits and proactively fight them off without significantly changing their behavior. When there is too much lawyer-centricity in a campaign, litigation can disempower and deter community-based tactics or lead them to put too much faith in the legal system. However, as is the case in *Standing Rock* and *Friends of Buckingham*, the nature of litigation, when paired with non-legal forms of advocacy, rather than disempowering and overshadowing grassroots activism, can legitimize and galvanize it.

## Part Two

### **The Goals of EJ Plaintiffs: Democratic Accountability, Corporate Responsibility, and Greater Involvement in Decision Making**

Environmental injustice is in part characterized by a lack of accountability on the part of either a governmental or private-sector actor, or a combination of both. This section presents examples of the types of ends towards which EJ litigation strives. Broadly, these fall under the categories of (1) attempting to get greater and more comprehensive accountability from local, state, and federal agencies, (2) alter corporate behavior that is causing or perpetuating environmental injustices, and (3) push back against "agency capture" by corporations in order to be able to have more influence in core regulatory activity like rulemaking and permitting.

#### **I. Democratic Accountability: Getting Agencies to Do Their Job**

The struggles by activists and the EJM as a whole to gain greater accountability from local, state, and federal agencies overseeing environmental regulation are characterized by divergent perspectives about what effective regulation *looks like*. Because environmental statutory law is so broad-reaching, direct accountability for environmental (in)justice can be traced back to the decisions of regulators around permitting decisions, rulemaking processes, regulatory structures, and interpretation of judicial decisions. Reaching these unelected officials and agency offices to demand accountability around localized challenges can be a difficult process, and one in which litigation can play a key role.

As Jill Lindsey Harrison has written about and Jeff Todd spoke to in our interview, government agencies have to balance a wide range of often conflicting constituent priorities, such as EJ commitments and authorizing new fossil fuel and mining development:

The problem is that you see the [Biden Administration] say, 'we're going to have EJ', but the thing is it's often government permits that allow corporations to do things that harm communities. So to say 'we're for EJ', but also do things that promote business, it's like trying to have things both ways. The government can't take one side or the other; the government looks out for government interests, corporations look out for corporate interests, and communities look out for community interests.

When I asked Brent Newell how he saw the role of administrative agencies in ensuring EJ, he emphasized that the first step is getting agencies to "do their job." "It all starts with the executive branch fulfilling its obligation to enforce the law, and administer the law in such a way that communities of color, who are disproportionately burdened by pollution, *benefit* from agency enforcement and agency decisions," he says. However, the plurality and volume of claims and perspectives that agencies respond to make this a challenging prospect.

In addition to EJ advocates, Harrison notes, "there's all these other actors out there in environmental politics making claims about what justice requires of government institutions, and some of those are very different from those of [EJ advocates]. But we need to recognize these different political positions do not stem from just carelessness or greed—though those things certainly exist—but people working from positions of justice that in many ways are very much in conflict with EJ principles." These positions, her research shows, include those of libertarianism, communitarianism, and utilitarianism, and can lead to powerful actors advocating vehemently against EJ-focused regulatory reforms.<sup>39</sup>

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<sup>39</sup> Jill Lindsey Harrison, *From the Inside Out: The Fight for Environmental Justice Within Government Agencies*. Cambridge, MIT Press, 2019.

The challenge of initiating EJ reforms within agencies and the realities of agency capture make litigation a key mechanism through which to demand agency action on a particular issue or to get agencies to be more generally accountable to EJ constituents. As Agyeman and others have observed, since EJ advocates often must take a "reactive" or "defensive" approach to their advocacy, litigation remains a key mechanism through which to gain accountability from agencies and corporations for past harm, or protect against an imminent threat which is already making its way through agency permitting processes and procedures. When an organization and/or community's public messaging, communication with regulators, written letters of public concern, participation in public hearings, protests, and other forms of reactive messaging fail to bring about an adequate response, organizations and communities will sometimes turn to the courts. Holding government agencies accountable on EJ issues ultimately comes down to disputes over procedural justice and disagreements over what procedural justice *means*. Many procedural requirements explicitly linked to EJ, such as those under NEPA, may have a *formal* commitment to EJ considerations, but substantively fall short in this commitment.<sup>40</sup>

Indeed, too often are procedures around EJ—to invoke the fourth circuit's opinion in *Friends of Buckingham*—seen as a "a box to be checked," rather than a real, meaningful and compelling reason to construe both permitting decisions and corporate actions in a sort of way. Jan Hasselman, lead counsel for the plaintiffs in *Standing Rock*, emphasized that the procedural efficacy of legislative and regulatory structures like the National Environmental Policy Act (NEPA) to substantively ensure against environmental harms and health concerns comes down to how comprehensive the agency's environmental review processes are, and to what extent needed changes raised in those reviews are

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<sup>40</sup> Agyeman et al., "Trends and Directions," 321-40.

addressed by regulators and those working on development projects on the ground. As Hasselman says,

It is true that under NEPA, as long as the government explicitly recognizes the impacts that it is having and fully discloses all the risks, it can do whatever the hell it wants. In practice, if you force agencies [through lawsuits] to admit that their decisions are too unjust or unjustified economically or too risky or impactful, then you get to a substantive decision. The NEPA process informs the decision of someone to grant a permit for the power plant, the pipeline, or that wetland fill or whatever, and if the NEPA analysis shows concerns, those concerns get addressed a lot of the time, though it certainly depends on who's in government.

Indeed, procedural requirements like those under NEPA can mitigate EJ concerns if, and only if, agencies (1) conduct an adequately comprehensive environmental review, and (2) actively mitigate the concerns identified in those reviews. Importantly, however, doing both those things is only an important step and in no way ensures that all the concerns of community members have been addressed. However, when formal procedures fail to address concerns raised by people who actually inhabit the areas that will be impacted by proposed projects, the intention of these procedures becomes eroded.

*i. Alaska*

While cases like *Standing Rock* and *Friends of Buckingham* aim to stop particular projects undertaken by corporations with the blessing of agencies, some EJ lawsuits aim at compelling agencies to take action on issues that they have either intentionally or inadvertently failed to act on. Such is the case with much of the litigation undertaken by ACAT. Despite its relatively small population, Alaska is home to over 400 public airports. "Because many of our communities in Alaska are not connected by road systems, they are very reliant on aviation for both deliveries and the transportation of people," Miller explained.

Many of the planes that do this work are single-engine piston-powered aircraft that use leaded aviation gas, the last major unregulated source of lead in the United States. Nationally, it is estimated that these aircraft account for 70% of atmospheric lead. EPA and the Federal Aviation Administration (FAA) has long been aware of the negative impacts atmospheric lead poses to both ecosystems and people, but has failed to take regulatory action on the issue for decades. As Miller put it,

This issue is critically important because children are particularly vulnerable and there is no safe level of exposure. Many of the communities around these airports are fenceline EJ communities—poor people and people of color. And that's the case right here in Anchorage where we have one of the largest airfields in the world using these single engine planes that rely on leaded aviation gas.

She further noted that this airport immediately abuts working class neighborhoods, and elementary school, and community gardens, all of which are subject to higher and compounding levels of respiratory lead exposure.

In *Alaska Community Action on Toxics et al. v. U.S. EPA et al.*, along with several other organizations and municipalities and represented by EarthJustice, ACAT sued EPA under the Toxic Substances Control Act, 15 U.S.C. § 2618, the Administrative Procedure Act, 5 U.S.C. §§ 701–706, and Rule 15 of the Federal Rules of Appellate Procedure. EPA was quick to respond. As Miller recalled, "Our lawsuit prompted [EPA] almost immediately—within just a few months—to announce that they were initiating an endangerment finding and later rulemaking process for this last, unregulated source of lead." When I asked her whether she thinks this sudden action on the part of EPA could be directly traced back to their lawsuit, she responded, "absolutely, no question."

Miller's comments require us to remember that there are many EJ-supportive staff within government agencies who want to take action on issues like atmospheric lead, that agencies are often aware of the problems of un(der)regulated pollutants in the abstract but unaware of their realities on the ground, and that agencies only have a certain regulatory purview which they can maintain.

Litigation can press regulators to reconsider these priorities and respond more comprehensively to EJ constituencies. As Miller puts it,

I do think litigation affects regulators, and elected officials as well, too. It shines a light on what regulatory agencies should be doing that they might not be doing. And I think in some instances, people within the regulatory agencies actually really appreciate getting sued—because they may hampered politically, but if they get pressured from the outside, then they're forced to do what they really should have been doing.

In the case brought by ACAT and Earthjustice, we see litigation acting as a catalyst for agency action on a particular issue that arguably would not have been adequately addressed without those most immediately affected bringing a lawsuit. Further, while this litigation was brought by community organizations representing particular groups around particular airports, the litigation facilitated actions by EPA that will hopefully protect countless others who were not connected to—or even aware of—the lawsuit.

*ii. Hawai‘i*

The U.S. Department of Defense (DOD) and the branches of the Armed Forces are arguably the most environmentally-destructive public institutions in the United States. DOD is yet another federal actor against which lawsuits seem to be a key means to accountability. Because of the strategic military importance of Alaska and Hawai‘i—or rather the importance that the military imposes *upon* those states, which are recent U.S. imperial endeavors—the negative ecological and human health effects of military exercises are felt much more strongly in these areas.

The Mākua Military Reservation (MMR) is located in a culturally and ecologically-significant valley on Oahu. After the bombing of Pearl Harbor, martial law was instituted in Hawai‘i and Mākua Valley became under the de facto control of the then War Department. In 1964, the Army paid \$1 for a 65 year lease of the valley, which has since been used as a live fire artillery and ballistics training ground,

despite being home to over fifty federally-protected endangered species and dozens of Native Hawaiian cultural sites and archaeological digs, most of which have been off limits to local Native populations due to concerns over unexploded ordnances. While the anticipated termination the Army's lease in 2029 is raising hopes that this area will be reclaimed by its original stewards, the Wai`anae, there is much work to do in the nearterm to both hold the Army accountable for the harm that has been done and ensure against future harm over the next several years.

In 2001, Earthjustice and its client, the organization Mālama Mākua, negotiated settlement in *Mālama Mākua v. Rumsfeld* requiring the Army to take a hard look at the environmental impacts of their training and prepare an EIS, pursuant to NEPA.<sup>41</sup> In 2008, the Hawai`i district court granted the plaintiff's motion to enforce the Army's settlement agreement to provide robust access to cultural sites and establish a schedule of unexploded ordnance clearance. In 2011, U.S. District Chief Judge Susan Oki Mollway ruled that the Army breached a court-ordered settlement requiring them to conduct a comprehensive study within EIS to examine the possible impacts to human health that training exercises could pose through contamination of traditional subsistence wild food items like fish, shellfish, and *limu* (seaweed).

As we can see, litigation is a key tool in demanding greater accountability from local, state, and federal agencies by EJ organizations and communities. Because agency staff members and administrators are not democratically elected, and because agencies are limited in the extent to which they are democratically accountable, lawsuits, when successful, can force agencies to address EJ concerns that have been previously deemed outside their purview. And even when litigation is unsuccessful, the initiation of a lawsuit—especially repeated, similar lawsuits—indicate to agency actors

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<sup>41</sup> This litigation continued into the Trump era and thus became *Mālama Mākua v. Mattis et al.*



that the content of such cases are areas where public and civil society pressure is crystalizing regulatory shortcomings. Further, litigation can also give EJ-supportive staff members further justification for the sort of reforms they have been advocating for all along.<sup>42</sup>

## II. Pushing Back Against Agency Capture

Corporations cause and perpetuate environmental injustices by privatizing profit and socializing social and environmental risks. Put differently, large, powerful corporations such as those in the fossil fuel, petrochemical, commercial agriculture, and transportation industries are able to not be held accountable for the negative externalities they impose on society because of the purported vitality of the products and services they produce to our modern market society. Lawsuits, in some cases, can have significant and sometimes relatively immediate impacts on corporate actions. In others, with their significant political and economic power, corporations can stave off litigation and continue their harmful practices in the absence of concrete regulatory action. Here I examine how these dynamics play out in my research at the federal, state, and local levels.

### *i. Federal*

As Jan Hasselman emphasizes, from a strictly legal perspective, *Standing Rock* is a case about the inadequacies of the federal environmental review processes and the applications of specific NEPA provisions to the DAPL context. However, for the Tribe, it is about concerns of sovereignty, cultural relations to water, and what they perceive as violations of the Laramie Treaty of 1868. And for the

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<sup>42</sup> "Army Agrees to Restore Access to Makua Cultural Sites." *Honolulu Civil Beat*, August 7, 2018. Accessed March 26, 2022. On November 7, 2016, Plaintiff Malama Makua filed a complaint alleging that Defendants violated paragraph 8(a) and (b) and paragraph 13 of the Settlement Agreement and Stipulated Order in *Malama Makua v. Rumsfeld*, Civ. No. 00-00813 SOM LEK (D. Haw. Oct. 4, 2001) ("2001 Settlement"). (EartJustice news publications, accessed March 26, 2022.

federal government, the case is one about the solvency of national energy demands and "energy independence."

The case is also undeniably an example of private monied interests coinciding with political energy agendas. Standing Rock Chairman Dave Archambault puts it this way:

We are a sovereign nation and we will fight to protect our water and sacred places from the brazen private interests trying to push this pipeline through to benefit a few wealthy Americans with financial ties to the Trump administration.

However, as was outlined above, the priorities and claims made by the Tribe outside the courts do not easily translate into legally-palatable and effective claims. Because the litigation rests on arcane provisions of NEPA, it is easy for the case to be reduced to a dispute over legal jargon rather than one of Indigenous sovereignty or adequate stakeholder engagement.

The Obama administration took important first steps in using congressionally-delegated presidential powers to direct the Corps to seek alternative routes for the pipeline that did not violate treaties or portend the end of the substantive water rights held by the Sioux. However, shortly after taking office, Trump bowed to lobbying pressure and used his administration's own interpretation of those same powers to override previous judicial determinations in the litigation to direct the Corps to conduct an expedited environmental review. Supporting this move, Craig Stevens, a spokesman for the Midwest Alliance for Infrastructure Now—an organization that has since been found to have created fake Twitter accounts to bolster public support for DAPL—lauded Trump's move as "proof-positive of President Trump's commitment to supporting domestic energy development, including midstream infrastructure projects."<sup>43</sup>

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<sup>43</sup> Juliette Eilperin and Brady Dennis, "Trump Administration to Approve Final Permit for Dakota Access Pipeline," *The Washington Post*, February 7, 2017. Accessed April 6, 2022. And "Jesse Jackson in North Dakota to Contest Dakota Access Pipeline," *Colorlines*, October 26, 2016. Accessed April 6, 2022.

Lacking in this sort of commentary is a cognizance of the fact that the pipeline was deliberately rerouted onto tribal lands and away from the mostly-white town of Bismarck, North Dakota, early in its planning stages, a move that Reverend Jesse Jackson called "the ripest case of environmental racism I've seen in a long time." Criticizing the Trump administration's move as positioning national energy priorities too prominently above tribal rights, Hasselman stressed in an email to *The Washington Post* in 2017 that

The Obama administration correctly found that the Tribe's treaty rights needed to be respected, and that the easement should not be granted without further review and consideration of alternative crossing locations... Trump's reversal of that decision continues a historic pattern of broken promises to Indian Tribes and violation of Treaty rights. They will be held accountable in court.

Because this dispute falls under both the judicial and regulatory purview—and align with major economic interests—of the settler nation-state, *Standing Rock* embodies regulatory agency capture on the national level. While the litigation was ultimately unsuccessful in halting pipeline operation until the the environmental review processes had concluded, the highly-publicized nature of both the protests and the litigation and protests at Standing Rock sent the message to both the public and the federal government that treaty and water rights are just as legitimate interests as national energy needs and independence.<sup>44</sup>

### *ii. State*

*Friends of Buckingham* illustrates how the energy priorities and fiscal solvency of states can pave over community concerns regarding the siting of noxious facilities at the state level. Dominion's capture of, and collaboration with, DEQ and the Air Board manifest in both covert and overt manners.

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<sup>44</sup> Juliette Eilperin and Brady Dennis, "Trump Administration to Approve Final Permit for Dakota Access Pipeline," *The Washington Post*, February 7, 2017. Accessed April 6, 2022.

Covertly, Chad Oba recalled, "[DEQ] was just working with Dominion on all this. It was just rubber stamping things. They would send [Dominion's] EIS back to them and say 'oh, you need to change this.' Did the citizens get to do that? No! And we weren't getting paid."

For context, in Friends of Buckingham's initial door-to-door survey of community members about their perspectives of the proposed project, they collected forty detailed and thoughtful letters of concern that were sent to the Virginia DEQ, almost twice what is needed to require a public hearing on a matter. "But DEQ ignored these letters," Oba said, "and this went on for years." In this case, we see that the agency was much more willing to work with the company and streamline its permitting process than it was to be receptive to concerns by people who would suffer the negative externalities of the compressor station.

Ignoring letters of concern and failing to fulfill their obligation to initiate a public hearing was not the only covert legal misdoing of DEQ and Dominion. Virginia's "best available control technology" rule relies on emissions reduction per emissions unit via production processes, methods, or techniques. Essentially, this rule requires that, when possible, agencies and corporations must implement the most efficient and least polluting technologies in the construction of a new facility.<sup>45</sup>

Oba recalled that, relying on both common sense and prior judicial interpretation of this rule, Friends of Buckingham and numerous other organizations and community groups repeatedly called for the use of electric, rather than natural gas-fired turbines, which do not emit the same harmful chemicals and are much quieter. "There were things that they weren't willing to do that would have reduced pollution", Oba said. Indeed, Dominion and DEQ ignored community calls for the

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<sup>45</sup> 9 Va. Admin. Code §5-50-260(C)

compressor station not to be sited in their community. They also ignored input to how the facility could have been more amenable to community needs.

More overtly, there was direct collaboration between Dominion and DEQ to get as many community members on board with the project as possible and delegitimize Friends of Buckingham's campaign against the project both before and after the lawsuit was underway. Oba recalled that

Dominion hired and sent in a very charming Black man, who had grown up in the area, and a former Agricultural Commissioner for the state, into the Black community to 'convince' them that hosting the pipeline would be a good idea... That it was a done deal and that they better settle and have a plan B because this plan A that we were going to win [in court] wasn't going to happen. It is even quite possible that some folks got paid off; there is an investigative reporter looking into it.

Whether or not there was direct bribery of community members in this process is outside of the scope of our present discussion, though the distinct likelihood and journalistic investigation of this occurrence should be recognized as significant in its own right.

What is important here, however, is that DEQ and Dominion leveraged their status as powerful social and political actors to deliberately undermine the message of a community-based organizing and erode faith in both the legal and non-legal tactics Friends of Buckingham was undertaking to look out for the wellbeing of the community as a whole.

### *iii. Local*

Throughout U.S. history, political theory has suggested that local politicians and bureaucrats are more able and inclined to be more directly accountable to a wider range of constituencies. We may also assume that local bureaucrats might regulate industry and the flow of capital into municipalities in such a way that private sector actors do not substantively disrupt the cultural, environmental, or historical character of cities and towns. These assumptions are not necessarily correct.

The extent to which processes of gentrification and a lack of affordable housing lead to the concentration of urban poverty and heightened exposures to environmental harms is an emergent topic in EJ discourse. My empirical research surrounding the intersections of the housing crisis in Kingston, New York and the proposed development "The Kingstonian"—and the lawsuits filed against city agencies as a result—demonstrate the way in which corporate development interests can harness local governmental support to overrule community concerns and objections.<sup>46</sup>

Even before the New York State eviction moratorium ended in January 2022, Kingston was facing a dire housing crisis; now it is even worse. The proposal of the "Kingstonian" project, a luxury, multi-use development which would entirely change the character of Uptown Kingston and gives rise to numerous concerns around public safety, environmental quality, and social justice appears to be rather perverse in light of the gravity of Kingston's housing situation.<sup>47</sup>

The City of Kingston partnered with JM Development Group LLC to spearhead a new \$52 million luxury mixed use development (see figure 8) on what project promoters call "2.5 acres of underutilized land on the up-and-coming center of Uptown Kingston", and will, through its public-private partnership, "address a dire lack of public parking that has emerged as an impediment to the areas' development." Since 2019, at least nine lawsuits have been brought by community groups and local businesses against the City of Kingston, the Planning Board, and other agencies.<sup>48</sup>

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<sup>46</sup> Matthew Desmond, "Eviction and the Reproduction of Urban Poverty," *American Journal of Sociology* 118, no. 1 (July 2012): 88-133.

<sup>47</sup> The project would include a 32- room hotel, 143 luxury apartments, a shopping center, and 420 car parking garage. There are a total of 5,897 rental units in Kingston. 1,197 of them are subsidized through grants or other public funding sources. That leaves at least 4,700 families renting in the free market, with limited protections against price increases or unfair or discriminatory evictions. Between 2002 and 2017, average rents in Ulster County rose by 55.8%, drastically outpacing wage increases. More than half of renters in the county are "housing cost-burdened", meaning that they consistently pay more than 30% of their income on housing costs; 30% of renters spend more than half their income on rent, categorizing them as "extremely cost-burdened." See: Jesse J. Smith, "Surge in Evictions Makes Tough Times for Kingston Tenants," *Hudson Valley One*, April 13, 2019. Accessed March 10, 2022.

<sup>48</sup> There are great ironies here. First, the area is not underutilized, as it currently hosts a range of homes, businesses, and mixed use buildings. Second, while it may seem "up and coming" to the outsider developer, Uptown has a centuries-old



Figure 8. A computer-generated model of the proposed Kingstonian development. (*Spectrum Local News*)

Shaniqua Bowden is a Kingston resident, community organizer, and staff member at the Kingston Land Trust (KLT), an organization that works on a range of issues including housing justice, historic preservation, and spearheads the Lands in Black Hands initiative, as well as working as part of the grassroots opposition against the Kingstonian. When I asked her about how and why KLT expanded its work into issues around housing justice, she noted that "housing was on the purview because Kingston was at the time—and still is now—in the midst of a housing crisis. Because that was the landscape we were in, here in this small city, the Land Trust wanted to be more receptive to this issue; not just land, but also what the community needed."

Like other many grassroots organizations, KLT has envisioned and sought to implement heterodox solutions to EJ-related civic challenges. Two specific solutions have been proposed: a "land-matching portal" and a community land trust (separate from the KLT, fully operated by

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history with numerous different waves of economic and social vibrancy. Third, the lack of public parking in the neighborhood is not an impetus for growth and development, but rather a side effect of it.

community members). Through the land-matching portal, Bowden explained, "people who have land in excess they would like to share with others can make an agreement and team up in that way and make that exchange with the absence of money. Community land trusts (CLTs) have a long historical precedent which can be traced back to the Civil Rights Movement, and there are around 250 in operation today. Black farmers formed CLTs in the post-Jim Crow South to reclaim and share dispossessed land in the face of predatory policies undertaken by the U.S. Department of Agriculture.

As Bowden explained,

There are also examples of community land trusts being used in [urban] housing. This way [residents] can establish their own set of policies and regulations. They can set up deed restrictions so houses can sell for less than they normally could. There's also a shared equity model that goes along with it. And because now that home is for sale at a lower price, it's available to someone who wouldn't normally be able to afford to buy a home.

Under this model, the land is owned communally, but households own the house on top of that land.

"It's like splitting the cost of the property," Bowden said, "because the buyer only has to buy the home, not the land." She further explained to me that city bureaucrats, tax assessors, and elected officials have met these sorts of proposals with skepticism or blunt resistance.<sup>49</sup>

While work on the land-matching portal and community land trust operates in the background, the Kingstonian development has been met with a robust activist response, both in and out of courts. This fight exemplifies the way in which the priorities of local government can easily be subsumed by the ambitions of private corporations, such as the partnership between JM Development Group and the City.

While the lawsuits against the project have aimed at particular concerns such as the inadequacy of the environmental review process, impacts on local businesses, the methodology of the Planning

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<sup>49</sup> "The Community Land Trust Model and Movement," Grounded Solutions Network publications. Accessed March 17, 2017.



Board review, and historic preservation, feedback given in public hearings around the project have not been incorporated into the decision making process.

Bowden's comments suggest that this is in part a result of vested interests held by elected officials vis-a-vis the development, as well as race-and- class based exclusions from legally-required public participatory processes. From her insider perspective as a Kingston resident, she explained that it is widely known that many of the city legislators, attorneys for the City, and advisors to the Mayor have personal financial ties to the project. "Everybody's just getting paid... nothing sounds right, it all sounds fishy." she says. This vested interest has translated into indifference around public input. Describing the nature of the mandated public hearings on the project, Bowden noted,

In these hearings, the room is packed. The line is out the door, across the street, down the sidewalk. You got people walking across fields and coming out of the woods to come to these things. There's stacks of letters a foot high on tables; hundreds of phone calls and emails.

The timing and nature of the Kingstonian proposal adds insult to injury in a city that feels like its elected officials have failed to act adequately on the housing crisis. As Bowden put it,

You have to look at what the priorities of the city are. Are the priorities to keep the people in the community in their homes, or are they to promote displacement, and what some people call 'good gentrification?' What about the people that already live on those streets [near the proposed Kingstonian site] and need those same upgrades?... We are just becoming more and more urban as we go along, and we aren't listening to the calls of those being displaced.

The indifference to public feedback, meager "affordable" housing allotments included in the Kingstonian proposal, and ongoing and exacerbating housing crisis in Kingston embody the way in which local governance can be captured by private development interest and lead to an exclusion of EJ community constituencies from decision making processes.

While some of the lawsuits against the project have been dismissed in the New York State Supreme Court, and other litigation is still ongoing and thus is not available for public access, we can understand the way in which these suits are pushing back against regulatory agency capture by the

Kingstonian, clarifying in legal terms, to both the public and local government, the way in which the demands being made by organizers on the ground translate into judicable questions. Time will tell whether moving these disputes into the legal realm will be more effective in ensuring accountability to community constituencies than demonstrations, media campaigns, and participation in public hearings have.

## Part Three

### **How Litigation Builds the Movement and Informs the Public**

Litigation, when fused with other forms of advocacy such as public outreach, media campaigns, community organizing, protest, and policy advocacy, can transcend being simply a means to direct accountability to a form of democratic participation. Over time, this sort of participation can become less *reactive*, to use Agyeman's conception, and become more *proactive*, lending to the advancement of larger movement goals. This section draws from my research to document some of the ways in which the secondary effects of litigation and associated non legal advocacy can increase public awareness of EJ issues and bolster support for specific EJ campaigns. Additionally, on examples from the focus cases and other litigation my respondents have been involved in, it shows the way in which the litigation process and litigation outcome—both positive and negative—can catalyze movement building and cross-organization collaboration both within particular localities and the EJM as a whole.

#### **I. EJ Organizations as Civil Society Organizations: Pairing Litigation with Non-Legal Forms of Advocacy to Shift the Overton Window**

The rather ambiguous notion of civil society is helpful to my analysis of the way in which EJ lawsuits create important secondary effects which can advance larger movement goals and serve as a key form of democratic participation for EJ communities. Civil society is most commonly conceived as the realm of social life distinct from markets, governance, and familial organization. However, civil society actors must necessarily engage with both the private sector and political, judicial, and regulatory actors in order to advance the reforms and cultural changes they wish to pursue.

Jeffery Alexander's concept of the "civil sphere" depicts a conception of civil society in which plurality and difference in worldview are mediated and reconciled through democratic processes and institutions, including law and legal processes, ultimately determining or reinforcing various normative social outcomes (i.e. policy change, ideological shifts, public opinion, political discourse).<sup>50</sup>

EJ organizations are civil society organizations. Despite its theoretical distinction from market forces, in our market economy, civil society and its discourse inevitably consider questions of social stratification rooted in uneven or oppressive material relations. Environmental injustices constitute unequal material relations in the sense that they stem from resource extraction and the production of waste that disproportionately affects certain groups.

However, EJ is not just about materiality, it is also about politics, law, regulation, and what Harrison calls "regulatory culture." Alexander notes that for Hegel, "the civil sphere was not only the world of economic needs, but also the sphere of ethics and law, and the other intermediate groupings that we today call voluntary organizations." EJ organizations are indeed these sorts of voluntary organizations, and they are trying to not only change material relations vis-a-vis EJ concerns, but also reform the law and the ethical roots of environmental regulation.<sup>51</sup>

Alexander observes that in the history of Western social theory and social science, the most influential approaches to how social movements operate within civil society to push social change and regulatory reform have been rooted in a historical understanding of revolutions and revolutionary processes that have been conceived as "mass mobilizations wresting power from an antagonistic state." The goals of these revolutionary processes, Alexander notes, is to "replace an oppressive form of state

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<sup>50</sup> Jeffrey Alexander, *The Civil Sphere* (New York: Oxford University Press, 2006).

<sup>51</sup> Alexander, *The Civil Sphere*.

Jill Lindsey Harrison, *From the Inside Out: The Fight for Environmental Justice Within Government Agencies* (Cambridge: MIT Press, 2019).

power with one directed toward a different end that makes use of similar means." Whether or not the EJM is trying to bring about a revolution in the traditional sense of the word is not the question here. Rather, I wish to examine how the EJM is using the courts as one forum (means) to reformulate state power to be more receptive to their particularistic priorities (ends.)<sup>52</sup>

To the public, there is something quite compelling and legitimate about a lawsuit. Particularly when plaintiffs from marginalized communities bring powerful corporate or government actors to court around an EJ dispute, there is something about the David and Goliath dynamic that both captivates and inspires the public eye. Regardless of the legal outcomes of a case, the broadcasting through communicative institutions of both the legal substance and the equity and identity-based articulations of a case has a powerful ability to raise awareness of the struggles of EJ communities in ways that other forums of disputing cannot. Further, public awareness and perception of a specific EJ campaign, and indeed the larger movement as a whole, is a prerequisite for its success and lasting impact.

For this to be true, my research indicates, lawsuits must necessarily be paired—in a very planned conscientious manner—with other forms of non legal advocacy. These include but are not limited to protests and rallies, media campaigns, policy advocacy, voter mobilization, and communication with congressional offices and agency staff. These forms of advocacy are vitally important because of the fact that litigation cannot do everything on its own. As we shall see, litigation is a key, yet limited form of democratic participation that must necessarily be paired with other forms of non-legal advocacy to have more broad reaching and long lasting effects. In our interview, Brent Newell speaks to this reality: "I see litigation as one tool in a tool box... litigation is a tool—indeed an imperfect tool—in EJ struggles.

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<sup>52</sup> Alexander, *The Civil Sphere*, 54-55.

The law was not written for the benefit of communities of color; litigation and enforcement of the law only gets you so far."

As Jan Hasselman puts it, in the EJ context, "litigation is never a means to an end, it's never valuable in the ether on its own." Jan and others agree: While the ultimate desired outcome of the EJM is a "complete transformation" of our economy, culture, and environmental regulatory system, as Hasselman says, "litigation can help move the various needles on the various dials that are helping to catalyze various shifts that are helping to catalyze that outcome." Another lawyer I spoke to noted that the "secondary effects of litigation are very important because they play an important role in shifting the overton window of how we think about EJ, climate change, and the courts."

*Friends of Buckingham* speaks well to the advantages of pairing legal and non-legal forms of advocacy in expanding the impact of lawsuits in the discourse of civil society. Chad Oba emphasized that before, during, and after their litigation in the fourth circuit, their "direct actions never stopped." "We knew that the public opinion was very important," Oba says, "we knew the legal case wasn't going to totally carry us. We didn't know what was going to happen in the courts." Friends of Buckingham and Southern Environmental Law Center knew they had a compelling legal case, but also knew the uncertainty that shadows judicial interpretations of regulatory decisions. Throughout the lawsuit, organizers continued informing both the community and the larger public of the importance of the campaign, both increasing their support base and inspiring other organizations and communities that would have been impacted by the same pipeline to take action.

Alaska Community Action on Toxics (ACAT) combination of litigation with other forms of policy advocacy on both the Alaskan and national scales speaks to the importance of public awareness as well. "I do believe litigation helps in the court of public opinion as well," Pam Miller says, noting that

litigation raises public awareness and attention toward an issue, and can lead to greater public pressure on those in power to act on an issue. She explains that ACAT "tries everything" in their advocacy, including local, state, and national policy advocacy, media advocacy, and participation notice-and-comment processes. Litigation, while often a "last resort," is often employed in conjunction with these other advocacy forms, never alone. Miller explained that ACAT tries to "pair litigation with public campaigns to make sure the litigation has the desired effects... litigation and campaigning sort of go hand in hand."

*Standing Rock* is another example of a successful pairing of legal and non-legal advocacy tactics, despite the case's eventual loss on the papers. Because, from a strictly legal standpoint, *Standing Rock* is a case about the inadequacies of the federal environmental review process, only real legal remedy to go back and do that process better. But, from a less-strictly legal perspective, *Standing Rock* is about something else: ending the pervasive historical trend of undermining the ecological and cultural integrity of Native land to serve the energy needs of the nation as a whole. While DAPL and the oil companies it services privatize profit, the risks and negative externalities of the pipeline are socialized to the Tribe.

Together, these legal and less explicitly legal goals of the case were combined in media coverage of both the protest and litigation. Despite the limited legal success of the case, the fact that this issue was being disputed in federal courts, with the U.S Government defending itself for failing to correctly implement and enforce a law which its very Congress enacted, was effective in crystallizing and legitimizing the claims that Earthjustice and the Tribe were making. As Hasselman says of the case,

That pipeline's still flowing, we never shut it down completely, but what I feel we achieved was a complete reframing of the issue to put marginalized communities at the forefront of this conversation; to frame it as "whose side are you on? This historically-oppressed community has been hurt by the oil industry. When people saw the images of the protests and the attack dogs and water cannons, I think it was very impactful in helping people to see what was at stake and when we talk about fossil fuel

development, who's being harmed. So, yeah, we didn't win our case, but we still brought the spotlight to one of the poorest and most disempowered communities in the country, and really galvanized Native communities nationally, and internationally, I've heard.

Paired with media coverage of an age-old image of U.S. settler colonialism—white, armed, federal marshals wearing cowboy hats on horseback, beating Native people with billy clubs to suppress resistance and advance national economic interests— the legal and non-legal tactics caught the attention of the public, civil society actors, and elected officials. So, while the legal loss of the case was of course a setback there were many other ways in which the case and larger campaign of resistance can be seen as a success.

## **II. Movement Building and Cross-Organization Collaboration**

Lawsuits—whether successful on the merits or not—can galvanize cross movement collaboration, inspire communities and organizations to pursue legal action for the first time or in a different way, build coalitions, strengthen existing ones and move toward larger movement goals. In this sense, litigation not only serves as a movement tool, but a way of building and strengthening the EJM itself. As demonstrated below, democratic participation vis-a-vis litigation comes both through direct participation with pre-litigation processes, as well as through the secondary effects of the litigation itself.

Legal cases, whether still active or decided, won or lost, can catalyze forms of democratic participation that advance movement goals and move toward conceptions of success that reflect the conceptions of justice to which organizers and communities aspire to achieve. The nature of litigation processes and the outcomes they create can bring communities and organizations together in ways that facilitate more effective participation in the discourses and institutions of civil society. As Jeff Todd



puts it, "it's a big stick to use, litigation, but it's one that can create talking points, brings a community together, gives them something to rally around; it frames issues, it invites a response, and the farther litigation goes, the better it is for the community." Pam Miller of ACAT agrees:

The litigation efforts that we have been involved in have been very beneficial because they help build bonds of organizations, and help strengthen coalitions, and ultimately the environmental justice movement. We talk to each other more, we develop more cohesive strategies, messages, and public campaign activities that are more effective.

Indeed, there is something about both the legitimacy and urgency of litigation that can foster cross-movement/organization collaboration, and the development of sort of cohesive messaging that Jim Irby of Coming Clean emphasizes is vital to educating the public, politicians, and regulatory actors about localized EJ issues on the ground.

Collecting the type of information that is needed to gain standing in a lawsuit—such as that which proves an agency did not consider EJ in its decision-making to the extent that the law demands—are coalition and movement-building practices in and of themselves. The work of community organizers and volunteers laid the groundwork for *Friends of Buckingham*; without it, there would have been no lawsuit. When organizers initially reached out to the South Environmental Law Center (SELC), they were told that their situation had little legal teeth. However, residents knew that if they could show that the DEQ was acting arbitrarily and capriciously— or perhaps even discriminatorily— or violating the law in *some* way, they would have a case. Through days of unpaid labor, Friends of Buckingham volunteers conducted a door to door site suitability survey, noting both the demographics of the residents near the proposed compressor stations as well as collecting their thoughts on the matter and educating them about the dispute.

Lawyers and activists alike that I interviewed agreed that citizen science and involvement with direct pre-litigation processes constitutes a key form of participation that establishes networks of trust

and collaboration that can in turn enable further democratic participation. As Brent Newell said in our interview, individual lawsuits can only do so much, "it's only with community organizing and narrative strategies that we can begin to build power vis-a-vis decisionmakers." Following the site suitability survey, they were able to officially determine that Black residents made up more than 85% of the population living within one mile of the proposed compressor station site.

Once this was determined and presented to SELC attorneys, they realized they had a case. Under Va. Code Ann. § 10.1-1307(E), when approving minor source permits, the the Air Board is required to consider, among other things, "the character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused," and "the suitability of the activity to the areas in which it is located." In the fourth circuit's decision, the court ruled that the board erred in failing to assess the compressor station's potential to cause disproportionate impacts on the predominantly Black community.

This is where the volunteer's grassroots data collection played a key role. "DEQ had diluted the numbers," Chad Oba explained. Indeed, the agency had simply used the census data for the *entire area*, not just the immediate one mile radius around the station, as required by Virginia state law. "There was enough that SELC felt we had a case," Oba said, "but we had to do the work, and that's why citizen science—citizen's being active—is so important." Not only had the Air Board and DEQ violated the law in failing to consider the nature and extent of the potential health impacts posed to those who lived within one mile of the proposed site, they had misinterpreted the law as well. Crucially, the court also rejected the Air Board's assessment that there *could be no disproportionate impacts* if the emissions from the station were *below* the National Ambient Air Quality Standards, determining that even if the

stations emissions remained below these standards, the Board still was required by law to assess the potential disproportionate impacts posed the community living closest to the station.

While the lawyers in *Friends of Buckingham* ultimately won the case in the courts, it was the residents that created the groundwork for the case. Combined with the resolute community organizing and direct actions that continued throughout the litigation process, these two participatory elements grounded the legal jargon which surrounded the case in something tangible and meaningful for Union Hill residents, providing a model and inspiration for similarly situated communities in Virginia and nationally to employ similar citizen science and litigation tactics in their advocacy.

Another similar example of participatory processes around litigation catalyzing movement building can be found in ACAT's work following the Exxon Valdez oil spill in 1989. Initial remediation efforts first consisted of using "skimming" technology to remove the oil from the surface of the water. When this showed limited efficacy, regulators and private contractors increasingly turned toward the use of chemical dispersants to break up the oil and "make it go away." Miller explained that following the "conclusion" of the "clean up" of the spill, ACAT conducted research with community and academic partners to understand the health risks that workers and surrounding communities suffered as a result of the use of these highly toxic dispersants. As Miller recalled, "of the thousands of workers that came to 'clean up'—and I'll put that in air quotes—the oil spills, the ones that were most harmed were the ones who worked directly with those dispersants. Even if they weren't neck-deep in oil, if they worked with the dispersants, which are highly toxic, they were the sickest of those who got sick."

Initially, ACAT advocated to get regulatory response on the state level, without success. The next tried to get federal regulators to respond to the problem, again without success, an effort that was

intensified by yet another, devastating spill two decades later. "We couldn't get EPA to move on it," Miller remembered.

Then when the BP oil spill happened in the Gulf [of Mexico], we saw many of the same larger trends of huge quantities of these dispersants being used. We recognized that this was a systemic problem and that unless we did something to intervene, this was going to happen with every oil spill that ever happens, which unfortunately are inevitable.

Using narratives from worker testimonies collected by a graduate student at Yale following the Valdez spill, ACAT partnered with several other organizations in Alaska and Louisiana to bring a citizen suit against EPA for its failure to meet its legal obligations to regulate the use of the dispersants under the Clean Water Act (CWA), represented by students and professors at the U.C. Berkeley School of Law Environmental Law Clinic. As Miller noted, the plaintiffs "included all the data we collected, as well as the testimonies of workers about the health impacts they suffered. The groups in the Gulf did the same thing, and they represented fishermen who were harmed, too." The stories of workers and surrounding community members, many of them made explicitly through the EJ frame, provided a key leverage point in the case alongside their citizen suit claims, arguably contributing to the success of the case.

EJ lawsuits—whether successful or not—can facilitate forms of grassroots direct action, as was seen in the dispute around the proposed construction of a thirty-meter telescope on top of the sacred mountain of Mauna Kea, technically the highest mountain on Earth. In their briefs, the plaintiff attorneys emphasized that "Native Hawaiian cultural practitioners believe that Mauna Kea, as a sacred manifestation of their ancestry, should be honored in its natural state and is desecrated by development of astronomy facilities near its summit." The plaintiffs alleged, among other things, that the decision of the Board of Land and Natural Resources to approve the telescope project (1) violated religious

exercise rights of Native Hawaiians protected by federal statutes, and (2) undermined elements of Hawai‘i’s public trust doctrine, examined in earlier sections of this work.<sup>53</sup>

The case ultimately did not prevail on the legal merits. As Moriwake explains, "the legal battle ran its course and ultimately [the plaintiffs] lost at the state supreme court. In Moriwake's words, the end of that legal process, the government said, 'the courts have spoken, the process has run its course, democracy worked, you guys lose, the telescope is going up.'" But it wasn't that easy.

The legal loss ignited a powerful activist response through direct actions, with protestors occupying the access road to the summit for nine months. Moriwake noted that there were "super close parallels" between the demonstrations on Mauna Kea and those at Standing Rock. "There was sanitation, food, medical care, and a university of sorts providing classes every day," he said. Like the community resistance in Moloka‘i, the protests over the thirty-meter telescope received national media attention.

While the fight against the telescope is still active, in Moriwake's eyes, the public awareness that has been brought to this particular dispute—and the ways in which it fits into a larger narrative of U.S. imperial infringements on Native sovereignty—has been invaluable. As he puts it, "I think it's an example of despite of—or even because of—the failures of the master's legal system, something better came to fruition." Litigational failures, participatory processes in themselves, can spur additional forms of civil society organizing and democratic participation that can bring organizations and communities together in a common cause and catalyze collective action in ways that other forms of advocacy cannot.

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<sup>53</sup> *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res. (Mauna Kea II)*.

## Conclusion

### **Litigation as Integration and Participation in Civil Society**

#### **I. Difference and Binary Exclusion in Civil Society**

Key to the contrast between EJ organizations and "traditional" environmental organizations is that the former operates within civil society in non-canonical ways. They approach environmental politics in a much different way than the civil society actors that are most influential in that realm: large, well-funded, and professionalized environmental organizations like the Sierra Club, the Natural Resources Defense Council, and the Environmental Defense Fund. The people of the EJM have historically been—and in many cases still are—people of color, women, the rural poor, the less-educated, Indigenous people, youth, and so forth, in contrast to the largely white, male, highly educated cohort of traditional environmental reformism.

For Jeffrey Alexander, civil society is both binarily constructed and exclusionary. Alexander emphasizes that what he refers to as the "primordial qualities" and "particularities"—self constructed and externally-imposed elements of identity rooted in "essentializing qualities"—have convinced powerful social and political actors that "only those who possess certain versions of these qualities have what it takes to become members of civil society." Indeed, from a broad and generalized perspective, it can be argued Black, Indigenous, and rural disenfranchised communities have over history—and in many contexts still today—been viewed by regulatory institutions as not possessing the necessary

qualities to be full participants in environmental decision making vis-a-vis both civil society and formal bureaucratic processes.<sup>54</sup>

## II. Incorporation into Civil Society: Assimilation Versus Integration

In her lecture *Keeping Ourselves- The Role of Land and Corporeality in Environmental Justice Education*, Professor Esme G. Murdoch observes that both the academic EJ canon and regulatory agencies often view specific elements of the achievement of environmental justice through the lens of very structures and institutions that have caused and perpetuated environmental injustices in the first place. For example, purely distributive conceptions of EJ redress such as monetary compensation, federal and state EJ grant programs, or the denying of a permit for a particular noxious facility under EJ procedural considerations such as those found in *Standing Rock* and *Friends of Buckingham* still fall under the logic of the capitalist nation-state and mainstream, ad-hoc environmental regulation.<sup>55</sup>

While these sorts of immediate and distributive redress of course have real value in addressing particular historical and contemporary inequalities, they do not substantially contribute to the large goals of the EJM or the ongoing political project that is environmental justice. What such a political project requires is real, substantive incorporation of the elements and ambitions of the EJ frame into core regulatory activities, legislative reforms, and jurisprudence. The previous section examined the ways in which the processes and secondary effects of EJ litigation bolster public awareness and facilitate movement building—how might those same processes and effects bring about the more substantive incorporation of EJ constituencies into civil society?

In each of the three focus cases examined in this research, we see the way in which non-legal forms of advocacy fell short in their goals because of the out-group status of the plaintiffs and their

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<sup>54</sup> Alexander, *The Civil Sphere*, 193-196.

<sup>55</sup> Lecture delivered by Professor Murdoch at Bard College on April 1, 2022.

communities. In *Friends of Buckingham*, Union Hill, a historic, predominantly Black community founded by formerly-enslaved people who developed a unique place-based relationship with and knowledge of the land, resisted against the discriminatory placement of a harmful air compressor station in their community. The community and the organization were given out-group status on the grounds of their racial devaluation and perceived illegitimacy of their concerns on the part of the Virginia Department of Environmental Quality (DEQ) and the Air Pollution Control Board. This manifested in DEQ's indifference toward the community's years of letter writing, protest, and other forms of community organizing.

In *Standing Rock*, the federal government used militaristic, carceral force—what Alexander would call *uncivil* actions—to suppress the protests that opposed the pipeline. Within federal agencies and the Trump administration, the Tribe's particularistic relationship with the land and waters of their reservation and their cultural values around water protection—primordial qualities—were not viewed as legitimate stakeholder interests. Like in *Friends of Buckingham*, the environmental review process was reduced to a procedural formality, just a “box to be checked,” rather than a legitimate and balanced civil discourse to be mediated by the courts and regulatory agencies.

In *Kivalina*, members of the Native Village, whose ancestors were forced to move to the precarious and hostile barrier island a hundred years ago, were for decades ignored by the State of Alaska in their pleas for relocation. Then and now, their unique knowledge of seasonal ice flows and weather patterns, and the changes they have observed as a result of climate change, have been discounted by governmental actors as being illegitimate concerns under the purview of the state. Their particularistic and primordial qualities relating to their traditional subsistence lifestyle and the ways



climate change has impacted such practices failed to be compelling to the governmental actors with the power to facilitate their relocation.

In the context of Kingston residents' and civil society groups' resistance to the Kingstonian development and general response to the housing crisis, specific social and environmental concerns of the project were brushed aside, and unique proposed solutions to the lack of affordable housing in the city were rejected due to their heterodox and explicitly anti-capitalist nature. The disproportionate exposures of Indigenous and low-income Alaskans to unleaded aviation fuel, Native Hawaiian access to cultural sites on U.S. military bases, the health impacts of chemical dispersants used in the Exxon Valdez oil spill, and the localized and racialized health impacts of American agriculture's unfettered love affair with pesticides— have all driven particular calls for justice in civil society that have been ignored or under-considered by regulatory institutions due to the out-group status of those who make these claims.

Indeed, if the discourse and processes of civil society can often operate in binary and exclusionary ways, how do what Alexander refers to as "out-groups" become full participants? Two approaches arise in scholarship: assimilation and integration. Alexander argues that assimilation has been by far the most common and effective way for out-groups to become full participants in the civil sphere. However, he suggests that "assimilation is not only unsatisfactory in a normative sense but unstable in an empirical one." Indeed, in this view, assimilation takes place when out-group members are "allowed to fully enter civil life on the condition that they shed their polluted primordial identities." In the context of environmental politics, out-groups like Indigenous and rural Black communities may in certain contexts find this approach undesirable. The legal cases and advocacy campaigns that have been examined here demonstrate the ways in which these groups may want to incorporate their unique

perspectives, priorities, and knowledge of natural and built environments into the discourse of civil society, not shed them.<sup>56</sup>

The EJ frame is well understood and frequently articulated in the lives and advocacy of EJ communities; it is less so among those who do not have personal experiences with the burdens of environmental harms. Agyeman observes that "the framing of EJM has thus created a very accessible *communitarian* discourse that those in disproportionately affected groups can identify with, mobilize around, and act upon." This, he notes, was formulated in part by the extent to which the Civil Rights Movement can be seen as a "tributary" of the EJM.<sup>57</sup>

What we are considering here is a process of bringing these discourses beyond just these groups and into the larger discourse of American civil society; assimilative processes are inadequate in this regard. Assimilation in this sense would portend the loss of these unique perspectives and concerns; integration, conversely, would elevate them to the same level as more powerful stakeholders like "traditional" environmental reform groups, scientists, and the industries which regulatory agencies regulate.

Alexander's theorizing draws on a network of increasingly influential social and political scientists who have attempted to trace the alternatives to assimilation into civil society. For example, David Snow has discussed how cognitive and moral framing of issues plays an important role in generating the public awareness and discontent that drives social movements, both among out-group participants and more importantly among the public. William Gamson has examined the role of resource mobilization and collective identity in incorporating particular concerns, like those related to EJ, into public discourse. Bert Klandermans and Sidney Tarrow have both noted the role of "collective

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<sup>56</sup> Jeffrey Alexander, *The Civil Sphere*, 421.

<sup>57</sup> Agyeman et al., "Trends and Directions", :321-40.

action frames"—similar to the EJ frame and the communitarian discourse Agyeman invokes—in fostering "consensus mobilization." Building off these conceptual frameworks, this paper has aimed to identify the ways in which engagement with both regulatory agencies and private sector actors through litigation can catalyze the integration of EJ constituencies into civil society without the stipulations attached to assimilation.<sup>58</sup>

The idea of putatively-excluded out-groups fostering and maintaining unique environmental relationships is not new. J.T Roane outlines the concept of the "Black Commons" through an analysis of post-emancipation African-American communities' environmental ethics and practices in the lower Chesapeake Bay. He writes that "Black communities maintained a vision of social-cosmological-ecological integrity at odds with the dominant vision of mastery and exploitation," and argues that these practices serve as "usable histories of alternative land and water resource allocation" in the context of the lower Chesapeake's "ongoing overdevelopment and toxification." When Dean Suagee states that harmful environmental impacts on tribal cultures "are disproportionate by definition," for the reason that "tribal people are affected differently because their relationship to the environment is different," he is suggesting that the broader relationship of Indigenous peoples to ecology—albeit a reductionist and essentializing one—operates exclusively in a sphere, that, to use Roane's theorizing, are "hidden and opaque to outsiders."<sup>59</sup>

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<sup>58</sup> Agyeman et al., "Trends and Directions" 41:321-40. *See generally*: W. A. Gamson, "The Social Psychology of Collective Action," in *Frontiers in Social Movement Theory*, (ed.) A. D. Morris & C. M. Mueller (New Haven: Yale University Press, 1992): 53-76. *And*: Klandermans, Bert et al. "Embeddedness and Identity: How Immigrants Turn Grievances into Action," *American Sociological Review* 73, no. 6 (Dec., 2008): 992-1012. *And*: Sidney Tarrow, "Cycles of Collective Action: Between Moments of Madness and the Repertoire of Contention," *Social Science History* 17, no. 2 (Summer, 1993): 281-307.

<sup>59</sup> Agyeman et al., "Trends and Directions" 41,321-40; J. T. Roane, "Plotting the Black Commons". *Souls: A Critical Journal of Black Politics, Culture, and Society* 20(3), 239- 266 (2018)

A question implicit throughout this project has been whether law and legal institutions are repressive, coercive, and anti-democratic in nature, or if they are accessible mechanisms through which social change—and relatedly social justice—can be achieved. There are compelling reasons to view law as a rigid, repressive force. The sometimes repressive nature of law and legal formalism is in part what precludes the substantive incorporation of out-group knowledge and consideration into legislation, policy, jurisprudence, and regulations.

Quasi-Marxist, economically-oriented theories of law assert that the "communal interests" ostensibly represented by law amount to little more than "coercive actions" that threaten "individual freedoms" and allow for the codification of social marginalization and economic subjugation into law. The position taken to heart in this project is not that these sorts of criticisms of the legal system are wrong, but rather that they don't fully consider the potential for law to be a democratic and liberating force. Along these lines, can we envision litigation—whether strategic or reactive—to be an area in which the law can evolve and meld to be more receptive to the concerns of EJ constituencies? Of the quasi-Marxist perspective perspective Alexander suggests that:

[What] these [theories] commonly ignore is the cultural dimension of democratic law, the dimension that anchors itself not only in formal precedent and logic, instrumental rationality, pragmatic negotiation, or coercion, but also in the idealizing, if bifurcated, vision of motives, relations, and institutions that allow civil society.

Conversely, pragmatic, sociological realism examines not only the law itself but also judicial behavior. This conceptual framework incorporates understandings of the school of legal realism, and its focus on the inner workings of legal practice and institutions. In this paper, I have extrapolated from this framework, looking not only at the behavior of judges, but also that of lawyers and their interactions with clients and client's communities.<sup>60</sup>

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<sup>60</sup> Alexander, *The Civil Sphere*, 158.

In the context of EJ and larger racial justice ambitions, legislative action and comprehensive regulatory reform are the ultimate goals, but these are immensely politically and culturally difficult reforms to bring about. As is absolutely central to the argument that has been developed here, litigation is a vital intermediary step that, when publicized through communicative institutions and operationalized within scholarly discourse, can push the public and all branches of government to be more responsive to particular agendas, or at the very least see things like the intersection of environmental quality and social justice in a new light. Alexander observes that "throughout the history of efforts to repair the racial distortion of American civil society, legal reform has thus represented the single most important regulatory ambition," and notes that Charles Houston, the pioneering NAACP lawyer, believed that "in court a black man could compel a white man to listen."<sup>61</sup>

In each of the cases and surrounding campaigns examined here, we see examples of the ways in which the processes and secondary effects of the litigation can catalyze EJ organizations' and communities' integration, rather than assimilation, into civil society. In *Friends of Buckingham*, the visibility of the protests, media campaigns, and the litigation itself raised public awareness in Appalachia of the impacts of national energy interests on small, rural communities. The ultimate success of the case signaled to similarly-positioned communities and organizations that the combination of citizen science, grassroots organization, and litigation under Virginia's relatively stringent implementation of federal environmental law can be an effective methodology for blocking the siting of noxious facilities and other unwanted land uses. And when the fourth circuit imprinted into federal jurisprudence that agencies must fully consider the disproportionate impacts of hazardous facilities on majority-minority communities and emphasized that "EJ is not just a box to be checked," it

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<sup>61</sup> Acronym: National Association for the Advancement of Colored People; Alexander, *The Civil Sphere*

helped crystallize to agencies and the industries they regulate that the priorities and demands of EJ constituencies are legitimate stakeholder interests that require real, comprehensive consideration in decision making. Not only does this sort of opinion impose liability through deterrence, it also legitimizes the claims of Friends of Buckingham and Union Hill residents within what Alexander refers to as "the civil sphere" in a way that the disputing and advocacy that occurred in other forums did not.

In *Standing Rock*, the lawsuit brought the uncivil, carceral, bloody, and highly-publicized dispute between heavily-armed federal, state, and local law enforcement and the sovereign peaceful water protectors into the "civil sphere." While the impetus of judiciability required the dispute—one inextricably connected to broader disputes of Indigenous sovereignty and America's crippling reliance on fossil fuels—to be reduced to one about the adequacy of the federal environmental review process, it crystallized the need for that exact process to more proactively examine the disproportionate impacts of fossil fuel use and development on historically marginalized groups. As lead counsel in the case, Jan Hasselman notes, the fact that at one stage in the litigation a federal judge ordered a pipeline carrying seven percent of the nation's crude oil supply to be shut down, that President Obama used executive powers to order the Army Corps of Engineers to seek alternative routes for the pipeline, and that the Supreme Court denied to review the Corps request to avoid having to conduct the more comprehensive environmental review that was ordered by the lower court, all signal that the particularistic interests of the Tribe were crossing the bridge between the moralistic ambitions of civil society and the formalistic duties of the federal government.

In *Kivalina*, the lawsuit brought what was previously a dispute between the community and the State of Alaska onto the nation scale. Rather than simply dealing with sea level rise and threats to their traditional livelihoods as threats stemming from intangible causal forces and begging the state to

respond to their plights, the plaintiffs and their lawyers decided to name and blame the perpetrators of their situation—the wealthiest and most powerful corporations on Earth—and bring them to court.

While much of the scholarly and media attention that surrounded Kivalina's advocacy drew on elements of the EJ frame and incorporated equity- and identity-based articulations into its rhetoric, the decision on the part of the Village and CRPE to focus purely on climate and tort law was deliberate. While the principle goal of the case was to attain a monied judgment to facilitate the community's relocation was ultimately not attained, *Kivalina* was highly successful in other regards. Its unique use of the federal common law to implicate a causal relationship between the actions of the fossil fuel industry and climate injustice garnered attention from lawyers, environmental law clinics, and law students. The fact that the case is now studied in law school signals its informative nature to the legal community. Further, in the face of the existential threat of climate change and its disproportionate effects in the Arctic, to Indigenous people, and to people of color more broadly, *Kivalina* presents the possibility of the expansion of federal common law jurisprudence to include the sort of "nuisances" experienced in Kivalina. In this sense, it sought a jurisprudential shift that would be receptive to the particularistic relationships and experiences of putative out-groups who live intimately within polluted natural and built environments.

In all these cases, lawyers acted as mediators and translators between the ambitions of civil society and the purview and priorities of government actors. In some ways the role of lawyers in the EJM is not unlike that of other social justice lawyering—educating communities about the extent to which the litigation can advance their campaigns and uphold or evolve the law to uphold their interests, and advocating on half of them. However, in many ways, lawyers involved with the EJM play a very unique role. The lack of statutory basis for many EJ lawsuits requires lawyers to balance the risks

of formulating unique interpretations of things like torts or civil rights law with the security of rooting claims in environmental law "straight up." The former can lead to determinations such as lack of standing or non-judiciability, while the latter reduces larger EJ disputes like those in *Standing Rock* and *Friends of Buckingham* to simple procedural or regulatory questions.

In all the cases, we see the way in which lawyers, law firms, and law clinics work to forge unique and productive relationships with EJ groups in their litigation process. Sometimes these can be fraught and precarious, like that which Jan Hasselman describes having with the Standing Rock Sioux. Sometimes these can be mutually-beneficial and long-lasting; Luke Cole and Brent Newell developed long-lasting personal friendships with Kivalina villagers, creating a sense of real personal stake in the litigation and its outcomes. And sometimes they require lawyers to do putatively non-lawyerly things, like the Southern Environmental Law Center attorneys who participated in rallies and direct action with Friends of Buckingham and Union Hill residents.



Figure 8. Friends of Buckingham activists with their attorneys from the Southern Environmental Law Center. (Courtesy of Chad Oba).



In the sociological theory of EJ litigation in the United States I have developed here, lawyers act as vital intermediary forces in the integration of EJ constituencies into civil society. In the face of political inaction on EJ, I contend that litigation will become the foremost disputing forum in which EJ constituencies may enact change. The environmental legal profession must adapt and evolve to this reality, finding new ways to better incorporate the particularistic concerns of such constituencies and, even when lawsuits don't win on the merits, advance the integration of the EJ frame into the discourse and processes of civil society.

### **III. Final Thoughts**

This project has provided a unique and contemporary account of the role of courts and litigation in the U.S. environmental justice movement. In seeking to examine what characterizes an EJ lawsuit from a standard environmental suit, I have focused on the strategic choice that plaintiffs and their attorneys face between including rhetorical elements of what I have referred to as the EJ frame and equity- and identity-based articulations in briefs and oral arguments or focusing strictly on environmental law. I further trace the ways in which such rhetorical strategies and framing are transferred from grassroots activism to the courtroom, examining how concerns of social equity, the power dynamics between litigants, and the requirements of various jurisdictions and legal frameworks impact this process.

In outlining the goals of the litigation my respondents have been involved in, I have demonstrated how EJ plaintiffs use litigation to gain greater accountability from both government agencies and the industries they regulate. I show how litigation can be a vital tool to block the siting of noxious facilities, press agencies to take action on particular issues, and more comprehensively incorporate EJ considerations into rulemaking, permitting, and public participatory processes. I

suggest that litigation can be more effective in pressing for these changes than disputing and advocacy in other forums. This is particularly true to the extent that its legitimacy in the eyes of powerful civil actors can push back against phenomena like agency capture and the stark power differentials between the plaintiffs and the defendants.

In conceptualizing litigation as a democratic participatory process, I have examined how the processes and secondary effects of EJ lawsuits, such as gathering the necessary information to gain standing and incorporating non-legal forms of advocacy alongside the lawsuit, can facilitate productive outcomes. These include generating public awareness of EJ issues and support for EJ causes, bolstering cross-organization communication and collaboration, and catalyzing judicial education around the intersections of environmental quality and social justice. Through this analysis, I have shown how litigation can also serve as a supra-legal process, crystallizing the motives and ambitions of civil society groups and infusing into public discourse, regulatory action, corporate decision making, jurisprudence, and the internal dialectic of the EJM itself.

Finally, I have posited the lack of political and jurisprudential reform on EJ issues to be in part a result of the frequent exclusion of the individuals, communities, and organizations that do EJ work from the discourse and processes of civil society. In tracing examples from my empirical research demonstrating how various rhetorical and legal strategies examined in Part One are employed to achieve the particular litigation goals outlined in Part Two, I suggest that lawsuits—usually alongside strategic and enduring grassroots advocacy campaigns in way Part Three documents—serve as a mechanism for a more integrational, rather than assimilative, means to the incorporation of EJ constituencies into civil society. Throughout this analysis, I have posited a vital role for lawyers as

translators and mediators—rather than simply litigators— and have floated the possibility for the reformation and development of environmental lawyering to adjust accordingly.

From a theoretical perspective, I have attempted to position this work in dialogue within the body of literature examining the relationship between the civil society and legal institutions, the democratic and antidemocratic faces of law, and how democratic civil society excludes and includes via interaction with various civil and uncivil processes. From a normative perspective, I have contributed to a burgeoning scholarly and public discourse around pragmatic approaches to environmental justice, climate justice, and public health equity. In doing so, I have extrapolated from and challenged canonical assumptions which posit that communities of color only have negative relationships with natural and built environments, only see the achievement of EJ through a distributive lens, and have limited interest or capability of enacting change through engagement with the legal system very legal system that has historically oppressed and dispossessed them.

At the same time, we cannot forget the wariness surrounding the legal system among social justice movements. It could be said that I have put forth an argument that suggests that, to invoke Audre Lorde, the master's tools must be used to dismantle the master's house. One could claim that I have posited that only engagement with formal legal processes will legitimate the claims made by EJ constituencies. This is not my intent. Rather, I have attempted to empirically document the way in which lawsuits bring about both redress for specific injustices and contribute to the larger integration of EJ communities into civic life, and serve as a one key instrument among many in the larger movement for environmental and climate justice.<sup>62</sup>

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<sup>62</sup> See: Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House* (London: Penguin U.K., 2018).

The EJM is not one cohesive mass. What I have documented here is not a reflection of all EJ litigation and activism. What I have suggested can happen here will be misguided in some contexts and quite accurate in others. Grassroots organizing and voluntary associations of citizens are the heart of EJ work, and is indeed the very foundation of American democracy. Climate change is an existential threat to all humanity, the single most complicated and pressing civic challenges faced by any government, anywhere, ever. However, those who are most socially and economically vulnerable are also the most environmentally vulnerable.

The same systems of power, greed, and privilege that have caused anthropogenic climate change also drive the disproportionate exposures to the toxification of natural and built environments. The political branches of government have been aware of this reality for half a century, and have failed to act to uphold the interests of the poor, marginalized, and young. In the face of this reality, courts should and will need to play a key role in mediating the multitude of EJ-related disputes which I predict will come through all levels of the judiciary in the coming decades.

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Figure 9. Photo courtesy of Chad Oba.



